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

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In the Matter of	)	
	)	
Dismissed Applications for New and/or Additional Transmitting Facilities in the Paging and Radiotelephone Service at Various Locations in the United States	)	File Numbers: As Listed in Attachment B hereto
	)	
Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18

To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

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SUMMARY

The Wireless Telecommunications Bureau's December 14, 1998 wholesale dismissal of the PRS applications listed in Attachment B hereto was arbitrary and capricious. The Bureau overlooked Commission precedent that had been established in connection with pending mutually exclusive MDS and cellular unserved area applications. The Commission processed these applications rather than, as here, dismissing them out-of-hand and subjecting the applicants to nationwide auctions. In dismissing the PRS applications, the Bureau provided no legal justification. The reason given was that the dismissals that the dismissals were necessary to facilitate the transition of the PRS from site-by-site licensing to geographic area licensing. But the Commission had previously stated that this reason is insufficient to justify the dismissal of pending site-by-site applications.

The PRS applications that were dismissed on December 14,1998 had achieved cutoff status under the Commission's Rules long before the Bureau's action. These applications are therefore entitled to protection from having to be considered comparatively with later filed applications, such as would be involved in an auction. The courts have consistently balanced the equities of cutoff rules in favor of applicants that have achieved cutoff status. The Commission has not amended Rule Sections 22.131, regarding mutual exclusivity, or 22.128, regarding dismissal of applications, in order to allow the Bureau to take this action. Rule Section 22.128 enumerates, with specificity, the grounds under which a PRS application may be dismissed. Dismissal in favor of a prospective geographic area application is not one of them.

Section 309(j) of the Communications Act of 1934, as amended (the Communications Act) limits the Commission's authority to resolve mutual exclusivity by competitive bidding. The artificial existence of mutual exclusivity, which the Commission creates when it allows

auction applicants to specify that they will bid in all markets when they have no intention of doing so, is likewise inconsistent with Section 309(j) of the Communications Act. Moreover, the Commission does not have carte blanche to resolve mutual exclusivity cases exclusively by competitive bidding. Rather, Section 309(j)(6)(E) of the Communications Act requires the Commission first use engineering solutions, negotiation, and threshold qualifications in order to eliminate mutual exclusivity. This requirement, which was reiterated in the 1997 Budget Act, is consistent with Rule Sections 22.129 and 22.135, which permit the Bureau to order applicants to participate in settlement conferences, at the risk of application dismissal, for failure to prosecute, in the event of nonparticipation. Only if these attempts at resolving mutual exclusivity fail may the Commission use auctions to resolve the frequency conflicts. However, such auctions must be restricted to the immediate applicants involved. The Commission may not simply dismiss their applications as an expedient to raising larger revenues by holding nationwide auctions with new applicants.

The wholesale dismissal of PRS applications, whether due to mutual exclusivity or because they were filed after the arbitrarily chosen date of July 31, 1996, is contrary to the public interest. Moreover, it is unconscionable that the Bureau has clung to this date despite the fact that there has been more than sufficient time, almost two-and-a-half years, to process these later filed applications. By not proceeding with the licensing of these expansion facilities, the Bureau is fostering inefficient use of the spectrum and delaying, if not preventing, the provision of paging services to unserved areas. In many instances, the applications dismissed requested authority to serve areas in close proximity to the incumbent licensee's existing service area, which the ultimate geographic area licensee would not be able to serve without causing harmful co-channel interference to the incumbent licensee. The result is that the area will remain

unserved because the incumbent licensee is barred from expanding its composite interference contour, and the geographic area licensee likewise cannot serve that area because it cannot protect the incumbent licensee from interference. This result is inconsistent with the Commission's public interest findings that justified the adoption of interim paging rules to permit the filing of 40-mile expansion applications by incumbent licensees.

Accordingly, for the reasons stated above, the PRS applications should be reinstated nunc pro tunc to pending status, and processed in accordance with law.

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To: Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

The clients of the law firm of Blooston, Mordkofsky, Jackson & Dickens, as listed in Attachment A hereto (BMJD Clients or Petitioners), all applicants for authorization of new and/or additional transmitting facilities in the Paging and Radiotelephone Service (PRS) at various locations in the United States, hereby request, pursuant to Section 1.106 of the Commission's Rules, reconsideration of the action taken by the Chief, Commercial Wireless Division of the Wireless Telecommunications Bureau (Bureau), by Order released December 14, 1998 (DA 98-2545), dismissing their applications as shown in Attachment B hereto. For the reasons set forth below, the dismissal of the applications listed in Attachment B hereto was arbitrary and capricious and contrary to law. Accordingly, the Bureau's dismissal action should be rescinded upon reconsideration and the applications reinstated nunc pro tunc and processed consistent with the Commission's Rules and the Communications Act of 1934, as amended (the Communications Act).

The reasons in support of this petition are, as follows:

I. Statement of Facts.

The Petitioners are all licensees of the Commission, under Part 22 of the Commission's Rules, in the Paging and Radiotelephone Service (PRS). They are generally classified as Commercial Mobile Radio Service (CMRS) providers in that they offer interconnected paging service to the public for hire. They require radio station licenses from the Commission to construct and operate the radio facilities over which the paging services are provided; indeed, their very existence and livelihood depend upon these licenses.

All of the dismissed applications listed in Attachment B hereto were properly filed in accordance with the Commission's Rules then in existence and listed on Public Notice by the Commission as accepted for filing. Moreover, the applications listed in Attachment B hereto were all filed prior to the adoption and release of the Commission's Second Report and Order and Further Notice of Proposed Rulemaking in the captioned WT Docket No. 96-18, in Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, 12 FCC Rcd 2732 (1997) (Second Report and Order). All of the applications, including those filed after July 31, 1996, had achieved cutoff status under Rule Section 22.131, well in advance of the release of the Second Report and Order, in which the Commission decided that "all pending mutually exclusive paging applications and all paging applications filed after July 31, 1996, other than applications for nationwide and shared channels, would be dismissed." See Second Report and Order, 12 FCC Rcd at 2739-40.

II. Dismissal of the Applications is Contrary to Law.

A. The Dismissal of the Applications is Arbitrary and Capricious.

The Bureau's wholesale dismissal of pending PRS applications, as announced on December 14, 1998, is unabashedly designed to "clear the decks" of any impediment to the Commission's plan to hold a nationwide auction of frequencies in the PRS (already a heavily licensed radio service) to facilitate geographic area licensing. However, the dismissal of these applications is an impermissible, disparate treatment of the Petitioners, vis-à-vis applicants in other heavily licensed radio services which subsequently became the subject of geographic area licensing through auction, e.g., Multipoint Distribution Service (MDS) and cellular unserved area applicants. It is well settled that the Commission must treat similarly situated applicants in the same manner. See Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985).

By dismissing mutually exclusive applications that had achieved "cutoff" status, i.e., entitled to protection from competing applications subsequently filed (such as applications filed pursuant to an auction), the Commission has treated applicants such as Petitioners, differently than applicants in these other services. The Commission has advanced no justification for this disparate treatment. Rather, in announcing its decision to dismiss pending mutually exclusive PRS applications, the Commission simply stated in conclusory fashion that "[d]ue to the transition to geographic area licensing in this *Order*, all pending mutually exclusive paging applications will be dismissed, including those filed under the interim rules. See Second Report and Order 12 FCC Rcd. at 2732 (1997). No explanation (let alone a reasoned explanation) was provided by the Commission to justify the dismissal of the applications listed in Attachment B hereto; nor was any reasoned explanation provided for treating PRS applicants differently from

similarly situated applicants in other significantly licensed services, which have been made subject to market area licensing through competitive bidding or otherwise. While the Commission may be justified in transitioning to geographic area licensing in the PRS, it may not ignore the rights of the Petitioners and other applicants whose applications were properly filed, accepted for filing and protected from subsequently filed applications under the cutoff rule.

In developing the rules for the MDS auction, for example, the Commission determined that it would not dismiss previously filed pending mutually exclusive applications. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and the Instructional Television Fixed Service, Report and Order, 78 RR 2d 856 (1995) (MDS Order). In so doing, the Commission stated that

> . . . dismissal of these previously filed applications without prejudice to participate in a future BTA auction – on the basis of a theory that the services for which the applicants previously applied either has changed significantly or no longer exists – presents several drawbacks. Significantly, dismissal of these pending applications would engender reconsideration proceedings at the Commission and legal challenges in the courts. Such administrative and judicial delays could further postpone granting MDS licenses and providing service to the public, contrary to the public interest. In addition, while we are changing the conditions under which MDS service may be provided in the future, such as moving to larger geographic area authorizations and expanded service area protection, we are not fundamentally changing the nature of the service.

Id. at 884.

As to the filing of cellular unserved area applications, the Commission's then existing rules provided that at the end of the five-year build-out period, third parties could file applications to serve portions of the market not served by the initial licensee.

Based upon these rules, McElroy Electronics Corporation and others filed unserved area applications which were listed on Public Notice as accepted for filing. Long after the close of the 60-day public notice period, during which time competing applications had been filed, the

Commission dismissed all of the unserved area applications as premature on the pretext that the Commission had not yet established processing rules for these applications. The court, in McElroy Electronics Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993)(McElroy I), disagreed and ordered the Commission, on remand, to reinstate the applications since they had been filed in reliance upon the rules then in effect. Id. at 1366.

Prior to acting on the applications pursuant to the Court's remand order, the Commission adopted new rules, similar to those adopted for the PRS in the Second Report and Order, upon which the Commission effectively would license unserved areas on a geographic market area basis, rather than on a site-by-site basis. As a result, an applicant interested in providing service in another unrelated portion of the geographic market would automatically be mutually exclusive with another applicant with an interest in a different portion of the market, even though there would be no actual electrical interference between the two proposals. On this basis, the Court rejected the Commission's proposal to include the prior cutoff applications in the same lottery along with the newly filed unserved area applications. See McElroy Electronics Corp., 86 F.3d 248 (D.C. Cir. 1996)(McElroy II).

It accordingly is self evident that the Commission's dismissal of the Petitioner's PRS applications is overwhelmingly at odds with its own MDS Order and the court's actions in McElroy I and McElroy II. In its Notice of Proposed Rulemaking (NPRM) in the captioned proceeding, 11 FCC Rcd. 3108 (1996), the Commission recognized that the paging industry is mature, competition is robust, and that paging spectrum is scarce. Id. at Paras. 5 – 6, 17. In particular, the Commission stated that the paging industry grew by approximately 29 percent in calendar year 1993 and 38 percent in calendar year 1994, bringing the total subscribership in the United States to more than 27 million. Id. at Para. 6. The NPRM stated that analysts predicted

that by the year 2000, 15 percent of the population of the United States (or 41.5 million people) would carry pagers. Id. As shown by the Commission's conclusions in its NPRM, which conclusions have not been refuted in the record of the captioned proceeding, it appears that the paging service is similarly situated with MDS and cellular service, which likewise, at the time of the auctions, were ongoing licensed services with significant subscriberships. In spite of these close similarities, the Commission has seemingly ignored the precedent established in the MDS auction proceeding and the directive of the court in McElroy I and McElroy II, in dismissing, without explanation the applications listed in Attachment B hereto.

The Court of Appeals has repeatedly reminded the Commission of the "importance of treating similarly situated parties alike or providing adequate justification for disparate treatment." Adams Telecom, Inc. v. FCC, 38 F.3d 576, 581 (D.C. Cir. 1994); McElroy I, 990 F.2d at 1365; see Melody Music, Inc., 345 F.2d 730, 733 (D.C. Cir. 1965)(The FCC must "do more than enumerate factual differences, if any, between appellant and other cases; it must explain the relevance of those differences . . .") (underlining added); see also Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (A reviewing court must set aside any agency action where the agency fails to provide a reasoned explanation for its conclusions).

As shown above, both the Commission's Second Report and Order and the Bureau's December 14, 1998 Order in the captioned proceeding are devoid of any legally valid justification for dismissal of the paging applications listed in Attachment B hereto. In that the Commission has previously stated that the transition to geographic area licensing, in and of itself, is insufficient to justify dismissal of pending site-by-site applications, see MDS Order at 884, the Commission's failure to provide a reasoned decision for the wholesale dismissal of the pending

PRS applications, including those listed in Attachment B hereto, is arbitrary and capricious and should be reconsidered.

B. The Dismissal of Mutually Exclusive Applications Which Have Achieved Cutoff Status is Otherwise Contrary to Law.

(i) The Bureau's Action is Inconsistent with the Congressional Mandate

The Commission was first granted statutory authority to conduct auctions for the award of radio licenses in Section 6002 of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 10-66, 107 Stat. 312 (August 10, 1993) (OBRA), which amended Section 309 of the Communications Act, by adding a new subsection (j). This legislation granted the FCC authority to use a system of competitive bidding as the method for granting licenses in the case of mutually exclusive application conflicts. The Commission's auction authority was subsequently modified by Section 3002 of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (August 5, 1997) (1997 Budget Act). However, neither OBRA nor the 1997 Budget Act vested in the Commission the authority to dismiss previously filed and pending applications for radio services that had already achieved cutoff status. To the contrary, as shown below, the principles set forth in Section 309(j) of the Communications Act require that the Commission continue processing mutually exclusive applications that have achieved cutoff status because doing so will expedite service to the public and result in efficient and intensive use of the electromagnetic spectrum. Moreover, the Commission's auction authority has always been limited by Section 309(j)(7) of the Communications Act which prohibits the Commission from "bas[ing] a finding of public interest, convenience, and necessity on the expectation of federal revenues from the use of a system of competitive bidding under this subsection." Given the amount of time that has elapsed since the applications listed in Attachment B hereto were

accepted for filing and the Commission's statement in the Second Report and Order that dismissal is necessary to facilitate the transition from site-by-site licensing to geographic area licensing, it appears that the motivating factor behind the Commission's dismissal action is the expectation of the attendant revenues that would be derived from an auction, even though this would severely compromise the speedy provision of service, contrary to the public interest. See MDS Order, at 884. Such a public interest determination, based upon the expectation of revenues rather than the prompt delivery of paging services to the public, is substantially at odds with the intent of Congress in framing the underlying auction legislation.

Section 309(j)(1) of the Communications Act, as amended does not authorize the Commission to dismiss pending paging applications which have achieved cutoff status in favor of prospective geographic area paging applications. Section 309(j)(1) provides, in pertinent part, that:

> If, consistent with the obligations described in paragraph (6)(E), mutually exclusive applications are accepted [for filing] . . . then the Commission shall grant the license or permit to a qualified applicant through a system of competitive bidding that meets the requirements of this subsection.[1]

The preamble to Section 309(j), as revised by the 1997 Budget Act, does not require the Commission to dismiss pending applications that have achieved cutoff status. Congress never intended for the Commission to dismiss site-by-site applications in favor of prospective geographic area auction applications when it initially granted the Commission auction authority

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[1] When Congress extended and expanded the Commission's auction authority under the 1997 Budget Act, the Conference Report, which accompanied this legislation noted Congressional concern "that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under Section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools to avoid mutual exclusivity. H.R. Report No. 105-217, at 552 (1997). To ensure that this important obligation was not overlooked, Congress amended Section 309(j)(1) of the Communications Act to bring these obligations to the forefront.

under OBRA, nor when it extended the Commission's auction authority under the 1997 Budget Act. Rather, Congress reiterated in the 1997 Budget Act that the Commission must first utilize engineering solutions, negotiations, threshold qualifications and other means to avoid or eliminate mutual exclusivity. Congress was very careful, when creating the statutory framework for competitive bidding, to limit the Commission's authority to instances where the auction of spectrum would be in the public interest.[2] Congress clearly did not intend for the competitive bidding process to become a means for the Commission to avoid all responsibility for thoughtful spectrum management.

(ii) The Commission is Required to Use Auctions to Decide the Conflicts Posed by the Pending Applications if All Else Fails.

Thus if the auction legislation were properly applied to the pending mutually exclusive applications listed in Attachment B, hereto (all of which have been "accepted for filing"), the Communications Act would require that auctions be held only among the pending applicants, as originally contemplated in the rewrite of Part 22 of the Commission's Rules in WT Docket No. 92-115 (after providing the applicants an opportunity to eliminate the mutual exclusivity) before the Commission could hold a nationwide auction to facilitate the transition to geographic area licensing. See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order, 9 FCC Rcd 6513 (1994), which adopted Rule Section 22.131. In

[2] Section 309(j)(3)(A) of the Communications Act requires the Commission to determine whether its proposed competitive bidding scheme will expedite service to the public. Here, the Commission only identified applications that were either mutually exclusive or were filed after July 31, 1996, for dismissal, in favor of future geographic area paging applications. Because the Commission has not yet released final auction procedures, much less a schedule for holding the auctions, it could be at several more months, if not until next year, before the auctions are held. As a result, it may be several more years, if at all, before the public in those areas that would have been served by the dismissed applications, receive service from the geographic area licensee, if at all.

this regard, Rule Section 22.131(c), provides in pertinent part that "[i]n selecting the [mutually exclusive] application to grant, the FCC may use competitive bidding, random selection processes or comparative hearings, depending upon the nature of the mutually exclusive applications involved."[3] Nothing in Rule Section 22.131 permits the Commission to engage in the wholesale dismissal of the Petitioners' pending applications (which had achieved cutoff status) in favor of a prospective group of geographic area paging applications yet to be filed.

Section 309(j)(6)(E) provides that "[n]othing in this subsection, or in the use of competitive bidding, shall be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations and other means in order to avoid mutual exclusivity in application and licensing proceedings." And, while the 1997 Budget Act greatly expanded the Commission's authority to use competitive bidding, the 1997 Budget Act is just as important for what it did not authorize – namely, the wholesale dismissal of pending applications that have achieved cutoff status. Here, the dismissed PRS applications in Attachment B hereto were timely filed in accordance with the Commission's Rules then in effect. Each of the applications was presumably prescreened for defects and listed on public notice as accepted for filing. The applications were apparently then processed to the extent necessary to determine mutual exclusivity, but the Commission never published a public notice listing these dismissed applications as mutually exclusive, and thus, never afforded the parties the opportunity to resolve the mutual exclusivity between the

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[3] It would appear that the Commission's authority under Rule Section 22.131(c) to resolve mutual exclusivity by comparative hearing and random selection has been superseded by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (August 5, 1997), which now requires the Commission to resolve mutual exclusivity by competitive bidding if engineering solutions, negotiations, and threshold qualifications are unsuccessful.

applications under the Commission's settlement rules, see e.g. Rule Sections 22.129 and 22.135,[4] or through engineering solutions or negotiations, as required by Section 309(j)(6)(E) of the Act. Thus, had the Commission given mutually exclusive applicants an opportunity to reach settlements under its regulatory structure, much of the mutual exclusivity could well have been resolved without the need for competitive bidding, and service to the public could have been promptly commenced.[5] Bolstering this position is the Congressional pronouncement in Section 309(j)(6)(F) of the Communications Act that "[n]othing in this subsection, or in the use of competitive bidding, shall . . . be construed to prohibit the Commission from issuing nationwide, regional, or local licenses or permits." This language suggests that Congress fully contemplated that the Commission would continue to process pending site-by-site paging applications to grant in the normal course rather than dismiss the applications in favor of future, prospective geographic area paging applications. Wholesale dismissal of these paging applications, in favor of prospective geographic area paging applications (which have not yet been filed) was not an

[4] In this regard, Rule Section 22.135 provides, in pertinent part, that the Commission "may direct the parties or their attorneys to appear before it for a conference. . . . (c) The failure of any party or attorney, following reasonable notice, to appear at a scheduled conference will be deemed a failure to prosecute, subjecting the party's application to dismissal." Thus, the Commission should have, consistent with its statutory obligations under Section 309(j)(6)(E), encouraged settlement negotiations or other solutions in order to resolve the mutual exclusivity cases before it. And, if a party or parties elected not to participate in the settlement conferences, as required by the Commission, the applications could have been dismissed pursuant to Rule Sections 22.128(c) for failure to prosecute.

[5] For those remaining applicants that were unable to reach a settlement, the Commission would then have subjected those applications to an auction between themselves. The 1997 Budget Act permits no other solution – not even dismissal for administrative convenience.

option under the Communications Act or Rule Section 22.131.[6] Accordingly, the Commission's action is contrary to its statutory authority and should be rescinded.

Only after the Commission resolves the mutual exclusivity of the protected cutoff applications would it be appropriate for the Commission to proceed with licensing the PRS frequencies on a geographic area basis. To do otherwise is artificially creating mutual exclusivity where it might otherwise not exist. Simply put, by making the geographic service area so large, and encouraging auction participants to select an "ALL" box on their short form applications, even though applicants have no intention of bidding in all markets, the Commission creates artificial mutual exclusivity so that the Commission can hold an auction. This manufacturing of mutual exclusivity where it would otherwise not exist is contrary to the mandate of Section 309(j)(6)(E), in which Congress specifically instructed the Commission to avoid mutual exclusivity, and not create it. Allowing the Commission to artificially create mutual exclusivity directly contravenes the Congressional mandate. Thus, dismissal of these PRS applications, in favor of future geographic area applications is contrary to law and should be rescinded.

C. The Cutoff Rules Require That the Commission Process the Dismissed Applications.

The Commission's cutoff rule in the PRS at the time the applications listed in Attachment B hereto were filed (Rule Section 22.131), was properly adopted, and remains in full force and effect. As such, the Commission is required to follow this rule. See Reuters, Ltd. v. FCC, 781 F.2d 946 (D.C. Cir. 1986)(ad hoc departures from published cutoff rules, "even to achieve

[6] The only dismissal provided under the Commission's Rules, pursuant to Rule Section 22.128, is dismissal of mutually exclusive applications that are unsuccessful, either because they are not selected in a lottery, or otherwise lose in competitive bidding or as the result of a hearing.

laudable ends" cannot be sanctioned). There is no dispute that the Commission can adopt new rules, as it has done here. However, making such new rules applicable to pending applications, retroactively, is an "extraordinary" measure which has often been viewed with disfavor by the Courts, absent an express statutory grant of power. See Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)(Retroactivity is not favored in law; statutory grant of rulemaking power generally requires express terms by Congress); Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and noted its troubling nature.").

The dismissed applications are those that were either filed prior to the February 8, 1996 adoption of the NPRM or pursuant to the interim rules adopted in the First Report and Order in WT Docket No. 96-18, 11 FCC Rcd. 16570 (1996). Thus, any new service area covered by these initial and expansion applications was not necessarily forecast by the Commission to be available for the geographic area paging auctions. In fact, the interim rules only permitted expansion facilities to be located within 40 miles of existing co-channel facilities. Moreover, applications filed under the interim rules, both before and after July 31, 1996, like those that had been filed prior to the adoption of the NPRM, were listed on Public Notice as accepted for filing, and subjected to competing applications by any interested party – i.e., an incumbent licensee or new competitor. Thus, the Commission could resolve any resulting mutual exclusivity pursuant to Section 309(j)(6)(E) of the Communications Act without compromising its proposed geographic area license auction since the impact on unlicensed "white space" would be limited by the restrictions imposed in the interim rules.

However, the harm resulting from the Bureau's dismissal of all mutually exclusive applications, as well as non-mutually exclusive applications filed after July 31, 1996, clearly

outweighs the Commission's desire to maximize the auctionable spectrum. While a number of the applications listed in the December 14, 1998 Order are apparently the product of so-called "application mills," all of the applications listed in Attachment B hereto were filed by bona fide existing paging carriers. These applications were filed in order to satisfy subscriber demands for improved service. Many of the dismissed applications have been pending for several years, because the Bureau has not been able to adequately address certain mutual exclusivity cases. In order to resolve some of those cases, the Bureau adopted, in 1995, a computer algorithm to expedite the processing of applications in the 931 MHz paging services. And, even though the algorithm identified mutually exclusive applications which it "blocked," the Bureau did not (i) issue a public notice so that the mutual exclusivity could be resolved in a timely manner, or (ii) where licensees came in on their own, either with contour plots or interference acceptance letters to permit grants and/or short spacing, the Bureau apparently took little or no individualized action to review the applications that had been listed as "blocked." Rather, the Bureau has chosen to summarily dismiss the applications, despite their cutoff status and without allowing for any special showings that might have been made to resolve the frequency conflicts.

Cutoff rules have long been recognized by the Courts to be an essential element to application processing. As a result, the Courts have long balanced the equities of these rules in favor of applicants who have achieved cutoff status. See McElroy Electronics Corporation v. FCC, 86 F.3d 248, 257 (D.C. Cir. 1996)(McElroy II)("As against latecomers, timely filers who have diligently complied with the Commission's requirements have an equitable interest in the enforcement of the cut-off rules." . . . "Moreover, the Commission may not decline to enforce its deadlines so long as the rules themselves are clear and the public notice apprises potential competitors of a mutually exclusive application."); Florida Institute of Technology v. FCC, 952

F.2d 549, 554 (D.C. Cir. 1992)(applicants achieving cutoff status "certainly have an equitable interest [in that status] whose weight it is 'manifestly within the Commission's discretion to consider.'")(citations omitted). The public interest is served by following the cutoff rules which bring forth the rapid service to the public, as well as the private interests of applicants who make the necessary investment in preparing, filing, and prosecuting their applications before the Commission. See Id. at 554 ("diligent applicants have a legitimate expectation that the cut-off rules will be enforced" and that the essential basis of the cutoff rules is . . . the public interest in having broadcast licenses promptly issued and service commenced without undue delay). Accordingly, the Commission should reinstate the mutually exclusive applications and process them according to law.

D. The Commission's Auction Will Result in Inefficient Use of Spectrum, Contrary to the Intent of Congress, and Will Delay the Provision of Paging Service to Unserved Areas.

Existing site-by-site paging systems have been licensed using a reliable service area contour (RSAC) that is entitled to protection from harmful co-channel interference. Because these RSACs do not form neat geographical shapes that can be easily fit together with neighboring co-channel facilities, the winner of a geographic area auction, in many instances, will not be able to serve those areas of its market where it cannot protect the incumbent licensees from harmful co-channel interference. A prime example of this occurs where an incumbent licensee has built a wide-area system that virtually surrounds an entire area, except for small pockets of land that are not included in the composite interference contour of the incumbent licensee. Because the location of the unserved area, is in close proximity to the incumbent licensee's existing service area, the geographic area licensee will likely not be able to serve this area without causing harmful co-channel interference to the incumbent licensee. As a result, the

area will remain unserved because (i) the incumbent licensee is barred from expanding its composite interference contour, and (ii) the market area licensee likewise cannot serve that area because it cannot protect the incumbent licensee's paging operations from the potential for harmful co-channel interference. This situation is likely in both the VHF and UHF bands and in the 900 MHz band. In the 900 MHz paging bands, this situation is likely to be exacerbated since the RSAC is a 20-mile circle and the interference contour is a 50-mile circle, resulting in a minimum of 70-mile separation between unaffiliated co-channel licensees. Because many of the applications that were dismissed by the Bureau's December 14, 1998 Order fall into this category, efficient spectrum management dictates that the Bureau process these applications in order to bring paging services to the affected areas as rapidly as possible. This is especially critical since most of these areas will not be capable of being served by the geographic area licensee for the reason stated above.

III. The Public Interest Justifies Processing of Post-July 31, 1996 Paging Applications

When the Commission modified the PRS application freeze to allow the filing of expansion applications by incumbent licensees, it indicated to the public that the processing of all applications filed after July 31, 1996 was not guaranteed, but stated that "the Bureau also intends to process initial applications filed after July 31, 1996. However, the extent to which post-July 31 applications are processable may be affected by the timing of the final order in the proceeding and the transition to new licensing rules." See Public Notice, Mimeo No. DA96-930, released June 10, 1996.

After July 31, 1996, the Commission continued to accept PRS expansion applications, and engaged in initial processing of these applications by reviewing them for basic acceptability, assigning a Commission file number, and placing the applications on public notice as accepted

for filing. In so doing, the Commission invited incumbent paging licensees to expend their resources by continuing to file expansion proposals, by reviewing applications listed on Public Notice and, in appropriate cases, by filing petitions to deny against applications accepted for filing.

To begin with, the Bureau is limited by its own rules in dismissing applications. State of Oregon Acting by and Through the State Board of Higher Education for the Benefit of Southern Oregon State College, 11 FCC Rcd 1843, 1844 (1996)("[I]t is a well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action.") citing Florida Institute of Technology v. FCC, supra. at 553 (rejecting the argument that an inadvertently issued second cutoff date supplanted the original cutoff date) (further citations omitted). In particular, Rule Section 22.128, which prescribes the situations in which applications may be dismissed, provides in pertinent part, that applications may be dismissed for the following reasons: (a) upon request of the applicant; (b) the application is mutually exclusive, but is not granted because (i) the applicant did not submit a winning bid in a competitive bidding process, (ii) the application was included in random selection process (which pursuant to the 1997 Budget Act is no longer available) and was not selected, or (iii) was not granted by the presiding officer following a comparative hearing (which likewise is no longer available pursuant to the 1997 Budget Act); (c) failure of the applicant to prosecute the application or respond "substantially" within a specified time to official correspondence or requests for additional information; (d) the application is defective, i.e., is unsigned or incomplete with respect to required answers to questions, informational showings, other matters of a formal character, or requests an authorization that would not comply with one or more of the Commission's Rules and does not contain a rule waiver request (or in the event the waiver request is denied, does not contain an alternative

proposal that is in compliance with the FCC's Rules); (e) the application requests spectrum that is not available, either because the requested frequency is not allocated for assignment in the Public Mobile Services, or because the frequency is assigned to another licensee on an exclusive basis and cannot be assigned to the applicant without causing the incumbent licensee harmful interference, or efforts for international coordination are unsuccessful; and (f) the application is untimely – either premature or late filed. In that dismissal of applications which have achieved cutoff status in favor of future geographic area applications is not a reason enumerated in Rule Section 22.128, the Bureau's December 18, 1998 dismissal action is an abuse of discretion.

Moreover, given the circumstances under which the post July 31, 1996 applications were filed, it is inconsistent with the public interest for the Commission to now dismiss these applications out of hand simply to maximize the auctionable spectrum. The same important public interest considerations that led the Commission to modify the paging freeze, apply to expansion applications filed after July 31, 1996. In particular, the Commission found that it was important to ensure that incumbent licensees were able to expand their existing coverage areas by a reasonable distance (40 miles), so that the coverage needs of their existing subscribers could be met. See First Report and Order, surpa 11 FCC Rcd. At 16581. In particular, the Commission concluded:

> We recognize, however, that an across-the-board freeze imposes significant costs on legitimate paging licensees with operating systems. As we recognized in the Notice, the paging industry is a dynamic and highly competitive industry that is experiencing rapid growth . . .. To meet customers' needs and improve service to the public in this highly competitive environment, paging operators need flexibility not only to make modifications within their existing service areas, but to add sites that extend the coverage of their systems into areas of new growth, such as outlying suburbs and new business centers. Even a short-term freeze has the potential to harm the paging industry and the public by deterring this growth and stifling investment. Moreover, the impact of the freeze is felt most acutely by local and regional paging systems, who are prevented from expanding while more than a dozen nationwide carriers operating in each market have no such limitation

> on their ability to respond to increased demand in high-growth areas. [footnotes omitted].

Id. The July 31, 1996 date was arbitrarily chosen, and in fact gave incumbent carriers (especially smaller ones) little time to locate suitable expansion sites, and prepare and file their applications. Grant of these expansion applications filed after the arbitrary July 31, 1996 date will further the Commission's public interest objectives as much as those filed prior to that date. And, given the significant lapse of time between July 31, 1996 and December 14, 1998, a period of almost two-and-a-half years, there has been more than ample time for these applications to be processed, especially since the Commission has yet to schedule the geographic area paging auctions. Thus, the dismissal of these post-July 31, 1996 applications, for the apparent purpose of increasing potential auction revenues, by maximizing the auctionable spectrum clearly contravenes Section 309(j)(7) of the Act. Accordingly, the Bureau should reinstate the post-July 31, 1996 applications nunc pro tunc and, promptly process them to grant.

IV. Conclusion.

The Commission had previously established in the MDS that it is not in the public interest to dismiss pending applications simply to facilitate the transition from site-by-site licensing to geographic area licensing. However, without explanation, this is precisely what the Bureau has done in the PRS. Even assuming arguendo, that there was a reasonable basis to distinguish the two radio services (which does not appear), the law is nevertheless clear: when faced with properly filed mutually exclusive applications from qualified applicants that are protected from subsequently filed applications by the cutoff rule, the Bureau must use competitive bidding in resolving mutual exclusivity after first attempting to eliminate the frequency conflicts through engineering solutions, negotiations, and other suitable means. Under

existing law, no other options are open to the Bureau. Likewise, the Bureau may not dismiss properly filed applications from qualified applicants that have achieved cutoff status because they were filed and accepted after the arbitrarily chosen date of July 31, 1996, even though this would increase the value, in some small measure, of the auctionable spectrum. Here, in an apparent move to avoid the time, effort and expense in holding limited auctions, the Bureau simply dismisses all of the applications to make way for full-scale nationwide auctions. While this may be the most expeditious approach, it is inconsistent with the mandate of Congress and will not pass muster if subjected to review by the U.S. Court of Appeals.

Accordingly, the applications listed in Attachment B hereto should be restored to pending status and processed in accordance with law.

Respectfully submitted,

THE CLIENTS OF BLOOSTON, MORDKOFSKY, JACKSON & DICKENS, AS LISTED IN ATTACHMENT A, HERETO

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ATTACHMENT A

Allcom Communications, Inc.
Cleveland Mobile Radio Sales, Inc.
Daniel A. and Jacqueline A. Johnson d/b/a Big Sky Beeper & Airpage
Mobile Phone of Texas, Inc.
Pay Phone, Inc.
RCC, Inc. d/b/a Radio Comm Company
Telephone & Two-Way, Inc.
Tri-County Telephone Company, Inc.
Ventures In Paging L.C.

ATTACHMENT B

Ventures In Paging

File Number	Location	Frequency (MHz)
28885-95	Tulsa, OK	931.2625
28871-95	Catoosa, OK	931.2625
28878-95	Moore, OK	931.2625
28880-95	Oklahoma City, OK	931.2625
30715-95	Tulsa, OK	931.9875
31500-95	Edmond, OK	931.9875

Allcom Communications, Inc.

File Number	Location	Frequency (MHz)
21671-97	Greenwood, AR	152.84
21849-97	Poteau, OK	152.84

Daniel A. and Jacqueline A. Johnson d/b/a
Big Sky Beeper & Airpage

File Number	Location	Frequency (MHz)
32492-95	Denver, CO	931.0000 (no specific frequencyrequested)

Tri-County Telephone Company, Inc.

File Number	Location	Frequency (MHz)
20716-97	Yeoman, IN	152.84

Cleveland Mobile Radio Sales, Inc.

File Number	Location	Frequency (MHz)
33381-57	Pittsburgh, PA	931.1875

Pay Phone, Inc.

File Number	Location	Frequency (MHz)
22378-95	W. Palm Beach, FL	931.7125
21516-97	Milliard, FL	931.5625
21519-97	St. Mary's, GA	931.5625
21523-97	Middleburg, FL	931.5625
21526-97	Baldwin, FL	931.5625
21529-97	Brunswick, GA	931.5625
21530-97	St. Augustine, FL	931.5625
21535-97	Switzerland, FL	931.5625

Telephone & Two-Way, Inc.

File Number	Location	Frequency (MHz)
20414-96	Crestline, OH	931.1875
25411-95	Youngstown, OH	931.1875
23802-96	Sydney, OH	931.1875
34537-96	Hamilton, OH	931.1875
21811-97	Millersburg, OH	931.1875
21932-95	Monroe Township, PA	931.3125
21938-95	Chelsea, MI	931.3125
21778-95	Painesville, OH	931.3125
21792-95	Fremont, OH	931.3125
21788-95	Cincinnati, OH	931.3125
21936-95	Indianapolis, IN	931.3125

Mobile Phone of Texas, Inc.

File Number	Location	Frequency (MHz)
34399-96	Mineral Wells, TX	152.12
34403-96	Mineral Wells, TX	152.51
34401-96	Mineral Wells, TX	454.150
34400-96	Mineral Wells, TX	454.275

RCC, Inc. d/b/a Radio Comm Company

File Number	Location	Frequency (MHz)
20818-97		
20820-97		
20823-97		
20824-97		
20825-97		
21195-97		
21196-97		
21198-97		

Attachment A

DOCUMENT OFF-LINE

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