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

In the Matter of	)	
	)	
Applications of Paging Network, Inc.	)	WT Docket No. 99-365
and Arch Communications Group, Inc.	)	DA 99-3082
for Transfers of Control of Their	)	File Nos. 0000053852 and
Radio Licenses.	)	0000056159

To: The Commission

PETITION TO DENY

Mobile Phone of Texas, Inc. (Petitioner), by its attorneys and pursuant to Section 1.939 of the Commission's Rules and Section 309(d) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. Section 309(d)(1), hereby petitions the Commission to deny the above-captioned applications of Paging Network, Inc. (PageNet) and Arch Communications Group, Inc. (AGI)[1], to the extent that the applications request a waiver of Section 24.101(a) of the Commission's Rules to permit Arch Communications Group, Inc. (as reconstituted following the merger of PageNet with the existing AGI to form Arch) to control more than three channels in the Narrowband Personal Communications Service. As demonstrated below, the request for waiver of Section 24.101(a) of the Commission's Rules should be denied, since Arch has not shown the required public interest justification in support of its waiver request.

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

[1] The various licenses in the Narrowband Personal Communications Service are held by Paging Network of America, Inc. and by Mobile Media Licensee Co., LLC.

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I. Statement of Facts and Standing

Petitioner provides commercial one-way paging services in north central Texas and competes with the applicants in the Wichita Falls and Abilene markets. In connection with its applications for Commission consent to the proposed merger of PageNet and AGI, Arch has requested a waiver of Section 24.101(a) of the Commission's Rules so that it can acquire, inter alia, all of the Narrowband Personal Communications Service licenses currently held or controlled by PageNet and AGI. If this waiver request is granted, Arch will be able to control five narrowband PCS channels on a nationwide basis,[2] and would therefore have a significant economic advantage over Petitioner in those markets in which both carriers would be providing paging service. Such advantage may be expected to result in economic injury to Petitioner of a direct, tangible and substantial nature. Accordingly, Petitioner has standing as a party in interest under Section 309(d) of the Act. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Northco Microwave, Inc., 1 FCC 2d 350, 351 (1965).

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[2] The four nationwide authorizations in the Narrowband Personal Communications Service cover Channel Blocks 1, 2, 7, and 10 (stations KNKV201, KNKV202, KNKV207 and KNKV209). Additionally, there are five regional authorizations in the Narrowband Personal Communications Service which cover Channel Block 14 (stations KNKV214, KNKV220, KNKV226, KNKV232, and KNKV238). The combination of these five regional authorizations would, in effect, give Arch a fifth nationwide authorization.

II. Arch's Waiver Request is Insufficient as a Matter of Law.

The major premise of Arch's request for waiver of the narrowband PCS spectrum cap, codified in Section 24.101(a) of the Commission's Rules, is that the Commission, in its Report and Order and Further Notice of Proposed Rulemaking, in Gen Docket No. 90-314, 12 FCC Rcd. 12972 (1997) (Further Notice), proposed to revise the narrowband PCS spectrum cap limitation in Rule Section 24.101(a). Waiver Request at 39, 46 - 49. However, a review of the Further Notice reveals that the Commission, in fact, proposed no actual revision to Rule Section 24.101 which would alter the spectrum cap limitation.[3]

In order to justify a request for rule waiver, Arch must demonstrate, in accordance with Rule Section 1.925(b)(3), that

> (i) the underlying purpose of the rule will not be served, or would be frustrated by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or
>
> (ii) the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. . ..

As demonstrated below, Arch's waiver request fails to meet this criterion.

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[3] In its Further Notice, in connection with the proposal to channelize the reserve narrowband spectrum, the Commission requested comment as to whether it would be appropriate to alter the narrowband PCS spectrum cap in Rule Section 24.101 if the proposed channelization of the reserve spectrum was adopted. This is a far cry from the applicant's claim that the Commission was proposing to eliminate or modify the narrowband PCS spectrum cap in and of itself. Waiver Request at 39.

In Mobilemedia Corporation, 14 FCC Rcd 8017 (1999), the Commission declined to grant AGI a similar request for waiver of the narrowband PCS spectrum cap in Rule Section 24.101, in connection with its acquisition of Mobilemedia Corporation. In denying the waiver request, the Commission held that AGI had "not made a sufficient showing" and that "[t]he mere possibility that a rule may be reexamined does not by itself warrant [the]grant of a waiver." Id. at para. 35. And, with respect to the Further Notice, the Commission stated in Mobilemedia Corporation that it had not even specifically proposed to modify Rule Section 24.101, which, again, is the subject of the instant waiver request. Id. Thus, the Commission required AGI to divest itself of the non-complying interests within six months after consummation of the acquisition of Mobilemedia Corporation. Id. This is the result that the Commission should reach here.[4]

Competition with Broadband Services

Arch asserts, in addition, that it believes itself to be increasingly in competition with cellular, broadband PCS and digital SMR service providers that have access to more

[4] Additionally, Arch surmises that the Commission will issue its order in response to the Further Notice within the same time frame that it obtains the Commission's consent to the instant transaction or shortly thereafter; and that this "coincidence in the timing of AGI's plan to acquire PageNet and the Commission's reexamination of its narrowband PCS aggregation rules" justifies a grant in the public interest. Waiver Request at 48. That the Further Notice was adopted in April, 1997 is no guarantee that the Commission will issue an order in the very near future, as Arch would like to believe. Rather, given the competing priorities facing the Commission , it could be quite some time before that issue is resolved.

spectrum. This, reasons Arch, justifies a waiver of the narrowband PCS spectrum cap. Waiver Request at 42. This assertion is unfounded. First, Arch overlooks the fact that paging messages, which are transmitted sequentially, occupy substantially less airtime than multiple, simultaneous two-way voice communications, thereby requiring significantly less bandwidth. Arch makes no showing, for example, as to how many paging messages can be transmitted in a given time frame over a single narrowband PCS channel, as compared with the number of two-way voice communications over a broadband PCS channel. Moreover, it is apparent that most subscribers to wireless telecommunications services opt for broadband services in order to obtain two-way voice communications, not one-way or two-way paging services.[5] This being the case, most customers would purchase their broadband services regardless of whether the service provider also bundled paging as an ancillary service. Accordingly, granting a waiver of Rule Section 24.101 will not make a narrowband PCS operator better able to compete with a broadband PCS service provider. Arch's claimed justification thus fails to meet the public interest requirement.

Additional Services

Arch claims that it must "hold enough spectrum to offer new and innovative services, with high information content." Waiver Request at 42. Arch states further that

[5] There is generally a substantial pricing difference between narrowband and broadband services. As a result, many subscribers who are interested in receiving one-way paging service may not desire the added expense associated with broadband PCS, cellular services, or digital SMR services.

150 kHz of narrowband spectrum is insufficient to meet this goal, and as such, it has no reasonable alternative within the confines of the narrowband PCS spectrum cap.

While Arch's desire to be able to provide "innovative services" is admirable, its argument appears nonetheless to be circular and unsupported by the record. First, Arch makes no mention of the types of "innovative services" that it could offer if it were permitted to retain all of the additional spectrum that it would acquire as a result of the merger with PageNet. And second, it states that without the additional spectrum, it cannot provide these "innovative services" which would be necessary to compete with broadband carriers. However, as noted above, narrowband and broadband services are dissimilar, and, as a result, narrowband service does not compete directly with broadband service. Arch's failure to specify the types of services it would otherwise provide strongly suggests that the additional spectrum would most likely have only a negligible impact on the breadth of Arch's service offerings.

Cost of Licenses Exceeds Today's Value

Arch claims that the devaluation of the narrowband PCS spectrum, following the FCC's licensing auctions, is a significant factor supporting its request for waiver of Rule Section 24.101. Waiver Request at 42. The inability of Arch to fully recover its spectrum investments, including the costs associated with the build-out of its systems, is not sufficient justification for a rule waiver, under the two-prong test set out in Rule Section 1.925(b)(3). Thus, the value of the licenses were established through auction

bids, and Arch, through its operating carriers, assumed the risk that the licenses (in the nature of a commodity) could potentially decline in value over time due to competitive forces in the marketplace, equipment availability and pricing, or otherwise. The Commission has always made it absolutely clear that it offers no guarantees that an auction winner will garner a profit from its licenses won at auction. See e.g. 929 and 931 MHz Paging Service Auction Bidder Information Package at 57. In that Arch (and its predecessors in interest) made the initial business decisions to acquire these licenses, as well as enter into a merger agreement, it cannot expect the Commission to bend its rules merely in the name of ensuring one carrier's profitability. To do so would compromise the integrity of the Commission's regulatory structure.

929/931 MHz Paging Auction

Arch claims that a grant of its waiver will not result in market concentration or impair competition. Waiver Request at 43 -44 In support, Arch states that "in some markets, new spectrum will be made available for use by paging and other messaging service providers this spring when the Commission auctions additional 929 MHz and 931 MHz licenses." Waiver Request at 44. Arch's claim that the Commission will be licensing new spectrum in the 929 and 931 MHz paging bands is misplaced. Arch is well aware that the licenses to be auctioned in Auction Event No. 26 are geographic area licenses that are being overlaid on top of incumbent licensees. Unlike some prior auctions, e.g., PCS, the 929 and 931 MHz geographic area licenses will not provide the auction winner with totally unlicensed spectrum throughout the market. And, because in

most markets, this spectrum is already heavily licensed, Petitioner anticipates that most auction participants, barring uninformed speculators, will likely be incumbents seeking to protect their existing frequency assignments and expand their service areas. It is not very likely that there will be many new entrants participating in the auction who are seeking to establish startup paging businesses. Arch's suggestion that the upcoming paging auction will produce substantial new competition in the paging markets is simply unsupported speculation.

As compared to the 929 and 931 MHz paging services, narrowband PCS, with its two-way feature, would appear to be the superior service, thereby giving narrowband PCS licensees a competitive edge over conventional paging service licensees in the VHF, UHF, and 900 MHz bands. Grant of the waiver request would only serve to enhance that competitive edge, thereby discouraging the entry of additional paging providers. In this regard, Arch's justification for a waiver is woefully lacking.

Spectrum Cap Serves a Significant Purpose

Based upon the Commission's action declining to adopt spectrum caps in the LMDS, WCS, and 220 MHz services, Arch asserts that "spectrum caps serve no significant purpose in competitive markets."

However, in light of recent Commission action, Arch's conclusion is demonstrably incorrect. In connection with the CMRS spectrum cap, the Commission recently

amended Rule Section 20.6 to increase the spectrum cap from 45 MHz to 55 MHz, but only in rural areas. See 1998 Biennial Regulatory Review: Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, Report and Order, FCC 99-244)(rel. Sept. 22, 1999). Had the Commission believed that the spectrum cap served no significant purpose in competitive markets, it would have lifted the CMRS spectrum cap altogether. Instead, the Commission retained the spectrum cap, which covers among others, the broadband PCS and cellular services. Thus, the Commission concluded that spectrum caps, such as the narrowband PCS spectrum cap, still serve legitimate public interest objectives.

As demonstrated above, Arch has failed to meet the two prong test contained in Rule Section 1.935(b)(3), namely, (i) that the underlying purpose of the Commission's Rule would either not be served or would be frustrated if the requested waiver is not granted, or (ii) that there are unique facts in this particular circumstance that make application of Rule Section 1.925(b)(3) inequitable, unduly burdensome or contrary to the public interest. It thus appears that Arch simply desires the windfall of additional spectrum that it would otherwise not be qualified to hold or control. Arch has not made a sufficient showing that application of the rule is unduly burdensome or would frustrate the Commission's intent in fostering competition. That this additional spectrum would make its proposed merger with PageNet more desirable does not, in and of itself, make the application of the narrowband PCS spectrum cap unduly burdensome or contrary to the public interest. Whether Arch desires to proceed with the merger is a business

decision based upon factors that Arch believes, under the Commission's regulatory scheme, would make the transaction a profitable venture.

III. Conclusion

Accordingly, for the reasons set forth above, the request for waiver does not meet the requirements of Rule Section 1.925(b) and should therefore be denied in its entirety.

Respectfully submitted,

MOBILE PHONE OF TEXAS, INC.

By

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Filed: January 28, 2000

Declaration

I, Mickey Shipman, hereby declare, under penalty of perjury under the laws of the United States, that I am the General Manager of Mobile Phone of Texas, Inc.; that I have reviewed the foregoing Petition to Deny; that I am familiar with the allegations of fact in the Petition; and that all such facts, except those of which the Federal Communications Commission may take official notice, are true and correct of my personal knowledge.

Mickey Shipman

Dated: January 28, 2000

CERTIFICATE OF SERVICE

I, Althea Pierce, an employee of the Law Offices of Blooston, Mordkofsky, Jackson & Dickens, certify that a copy of the foregoing Petition to Deny was mailed this 28th day of January, 2000, by United States first class mail, postage prepaid, to the following:

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