

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

In the Matter of	)	
	)	
Implementation of Sections 309(j) and 337	)	WT Docket No. 99-87
of the Communications Act of 1934	)	
as Amended	)	
	)	
Promotion of Spectrum Efficient Technologies	)	RM - 9332
on Certain Part 90 Frequencies	)	

**To: The Commission**

**PETITION FOR RECONSIDERATION AND/OR CLARIFICATION**

Blooston, Mordkofsky, Dickens, Duffy & Prendergast, on behalf of its paging clients listed in Attachment A hereto (Private Paging Coalition), hereby requests, pursuant to Section 1.429 of the Commission's Rules (47 C.F.R. §1.429), reconsideration of the Commission's action taken in its Second Report and Order and Second Further Notice of Proposed Rule Making ("Second Order") which resulted in the amendment of Section 90.35(c)(29) of the Commission's Rules to delete the language which permitted the Part 90 paging channels to be authorized with a bandwidth of 25 kHz.<sup>1</sup> As demonstrated below, this action is in error, and the Commission should rescind its action and revise Rule Section 90.35(c)(29) to permit continued licensing of the

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<sup>1</sup> To the extent that the Commission's action regarding the amendment of Section 90.35(c)(29) was an unintended consequence of its action to impose a permanent freeze on the acceptance of wide-band applications in the Part 90 land mobile services, the Private Paging Coalition requests clarification that the Industrial/Business Pool paging-only channels (e.g., 150.830, 150.920, 151.310, 152.48, 157.74, 158.460, 462.750, 462.775, 462.800, 462.825, 462.850, 462.875, 462.900 and 462.925 MHz) will continue to be licensed on a wide-band 25 kHz basis.

Industrial/Business Pool paging-only channels on a 25 kHz basis, notwithstanding the provisions of Rule Sections 90.203 and 90.209.

In support hereof, the following is shown:

### **I. Statement of Interest**

The Private Paging Coalition is comprised of companies who utilize, either directly or through resale arrangements, the Part 90 Industrial/Business Pool paging-only channels for paging services. Many of these companies have developed wide-area networks on the frequencies 152.48, 157.74 and the 462 MHz paging only channels. In many cases, these networks are interconnected with other co-channel paging networks in order to greatly increase the coverage footprint. Because many of these networks are comprised of hundreds (or in some cases – thousands) of transmitter, the requirement to change a single transmitter to narrowband would have an adverse impact on the interoperability of the network in that it would become difficult, if not impossible to effectively simulcast the signal so that it could be received reliably by the paging receiver.

### **II. Statement of Facts**

On June 23, 1995, the Commission released its Report and Order and Further Notice of Proposed Rulemaking, Replacement of Part 90 and Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, 10 FCC Rcd 10076 (1995) (“Refarming R&O”). At footnote 116, the Commission stated, in pertinent part, that “[c]hannels designated for paging-only are not being narrowbanded and will remain wideband.” On November 20, 2000, the

Commission released its Report and Order and Further Notice of Proposed Rule Making in this proceeding in which it requested further comment

on the effectiveness of the Part 90 rules that have been adopted in the course of the Commission's *Refarming* proceeding, the current pace of migration to narrowband technology, and on whether enough time has elapsed to allow us to evaluate the effectiveness of our current rules.<sup>2</sup>

On February 25, 2003, the Commission released its Second Order, which amended Rule Section 90.35(c)(29) to delete the language that the Industrial/Business Pool paging-only channels would be licensed with 25 kHz bandwidth. A review of the Second Order reveals no discussion of this matter.

**III. The Commission's Order is Devoid of Any Discussion Justifying the Unexpected Amendment of Rule Section 90.35(c)(29).**

The Commission's Second Order in this proceeding is devoid of any discussion, much less a concise statement justifying its apparent decision to narrowband the private carrier paging-only channels in the Industrial/Business Pool. Instead, the Second Order simply deleted the first sentence of Rule Section 90.35(c)(29), which specifically stated that the Industrial/Business Pool paging-only channels would be licensed with 25 kHz bandwidth. In so doing, the Second Order appears to impose narrowbanding on these very same paging-only channels that had been exempted from narrowbanding by the Commission's Refarming R&O, released June 23, 1995. In particular, the Refarming R&O stated that "Channels designated for paging-only are not being narrowbanded and

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<sup>2</sup> Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, WT Docket No. 99-87, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22709 (2000), para. 9 ("R&O and FNPRM").

will remain wide-band.”<sup>3</sup> As discussed below, it appears that this action was unintentional, and can be easily corrected as a clarification. If intended, the Commission was required to make the public aware of this proposed rule change, and proffer a sound basis for the decision.

**A. The Commission’s Action Appears to be Inadvertent.**

The Private Paging Coalition believes the reason that the Commission’s Second Order in this proceeding is silent on the issue of narrowbanding the Industrial/Business Pool paging-only channels is that the Commission had no intention to narrowband these channels. This conclusion is buttressed by the Commission’s action in the Second Order with respect to the Public Safety Pool paging-only channels. In particular, the Commission amended Rule Section 90.20(d)(30) to specifically authorize the continued licensing of the Public Safety Pool paging-only channels with 25 kHz bandwidth, “notwithstanding Sections 90.203 and 90.209 of this Part.” See Second Order, Appendix B, Page 15. The Private Paging Coalition believes the Commission actually intended to make the same revision to the first sentence of Rule Section 90.35(c)(29) rather than deleting the first sentence in its entirety. If this is the case, the Commission should clarify that the deletion of the first sentence of Rule Section 90.35(c)(29) was inadvertent and that the sentence should have been revised to permit the continued licensing of the Industrial/Business Pool paging-only channels with 25 kHz bandwidth, notwithstanding the provisions of Sections 90.203 and 90.209 of the Commission’s Rules.

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<sup>3</sup> Refarming R&O, n. 116.

**B. In the Event that the Commission Intended to Narrowband the Industrial/Business Pool Paging-Only Channels, this Action Would be Arbitrary and Capricious and Contrary to Law.**

If the Commission intended to amend Rule Section 90.35(c)(29) to delete the first sentence, in order to narrowband the paging-only channels in the Industrial/Business Pool, such action would be arbitrary and capricious and contrary to law. This is because the Commission provided no notice of such action in its November 20, 2000 R&O and FNPRM. This narrowbanding action constitutes a substantive change to the Commission's Rules and is subject to the notice and comment rule making requirements in accordance with Sections 553(b) and (c) of the Administrative Procedure Act, 5 U.S.C. §553(b) and (c) (2003) (the APA).<sup>4</sup> Section 553 of the APA requires the agency to provide notice of a proposed rule change, and to articulate a concise statement for adopting the proposed rule. A review of the Commission's FNPRM and Second Order in this proceeding reveals that the Commission did not do so.

It is well established that substantive rule changes require notice and comment rulemaking. See Section 553 of the APA; Chrysler Corporation v. Brown, 441 U.S. 281,

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<sup>4</sup> Section 553 (b) and (c) of the APA provide, in pertinent part, as follows:

- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or have actual notice thereof in accordance with the law. . .
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

99 S. Ct. 1705, 1718 (1979) (Substantive rules subject to APA notice and comment requirements are those which “affect[] individual rights and obligations”). Here, paging licensees in the Industrial/Business Pool Service have become obligated to narrowband as it becomes necessary to relocate, modify or add transmitters. This obligation will have profound effects on the paging licensees, especially at a time when the paging industry is in decline and new equipment is not offered by mainstream vendors such as Motorola and Glenayre. And, even though Rule Section 90.35(c)(29) was amended during the course of an on-going rule making proceeding, the Commission did not include this particular amendment within the scope of its proposal in the underlying FNPRM. As a result, interested parties did not have the requisite notice of this substantive rule change, as required by Section 553 of the APA.

Finally, because the Commission’s action with respect to the Industrial/Business Pool paging-only channels differed from its decision to amend Rule Section 90.20(d)(3) to permit continued licensing of the Public Safety Pool paging-only channels with 25 kHz bandwidth, notwithstanding the provisions of Rule Sections 90.203 and 90.209, the Commission was required to justify such disparate treatment of similarly situated applications. See Green River, 765 F2d 235 (D.C. Cir 1985); Melody Music, Inc. v FCC, 345 F2d 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 F3d 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).

Both public safety entities and private carrier paging licensees use their paging channels to contact doctors, police, fire, rescue and other personnel associated with the protection of life and property. Accordingly, subjecting the Industrial/Business Pool paging-only channels to narrowbanding for the first time is contrary to law.

**C. Narrowbanding of Paging-Only Channels is Contrary to the Public Interest.**

**1. The Paging Industry is Suffering Financially.**

The Commission has recognized that over the past seven years, the paging industry has dramatically declined from a robust industry to an industry that is characterized by low profitability, declining subscriber bases and intense competition from other commercial mobile radio service providers. See Assessment of Regulatory Fees for Fiscal Year 2003, Report and Order, MD Docket No. 03-83, \_\_ FCC Rcd. \_\_ para. 21 (2003). As a result, several major carriers, including MobileMedia Corp., TSR Wireless L.L.C., Arch Wireless, WebLink Wireless, Inc. and MetroCall (the second largest paging carrier in the United States) have been forced to file for bankruptcy protection. Not all of these carriers have been able to emerge from bankruptcy.

The Commission's own wireless competition reports confirm that between 1998 and 2003, the percentage change in growth of paging/messaging units dramatically changed from an increase of 4.4 percent per year to a decrease of 20 percent per year and that the average revenue per paging unit decreased as well. Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Sixth

Report, 16 FCC Rcd. 1350 at Table 5 (2001) (“2001 Competition Report”); Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eighth Report, (WT Docket No. 02-379), 18 FCC Rcd \_\_\_, para. 141 (2003) (“Using NRUF data, we estimate there were 14.1 million paging units in service at the end of 2002, down 22 percent from 18 million units at the end of 2001.”). With the drop in subscribership, there has also been a significant drop in revenues per subscriber. This dramatic decline in paging subscriber base and in revenue would make it difficult, if not impossible for most paging carriers to convert their paging systems to narrowband technology due to the extreme cost in locating and procuring new equipment. Indeed, it is doubtful that such equipment would even be available since manufacturers such as Motorola and Glenayre have discontinued the production of new paging transmitters, thereby forcing paging carriers to rely on the recycling of used equipment (much of which may be more than 8 to 10 years old). See Declaration of Michael J. Batis.

**2. Narrowbanding Would Place an Undue Hardship on Paging Carriers and their Users.**

Most paging systems that are in place today are not single site systems. Rather, paging carriers have created wide-area systems, both through networking/intercarrier agreements with other co-channel licensees or by building wide-area systems with numerous transmitters. Many of the regional or nationwide systems may have upwards of hundreds of transmitters, and it is not uncommon for smaller wide-area systems to have as few as three or four transmitters. Carriers are able to provide paging services on

a wide area basis by simulcasting these transmitters. This is technologically feasible because the transmitters are compatible for common control by the paging terminal. If paging carriers are required to use narrowband transmitters in future modifications to their systems, they will be forced to seek replacements for all of their transmitters at once, since narrowband transmitters would be incompatible with existing wideband transmitters. The licensees would be unable to prevent heterodyning between signals from narrowband and wideband transmitters, making it difficult to lock onto the desired paging signal and resulting in lost paging messages. See Declaration of Michael Batis. Because of this need to do a total system replacement, the cost to add sites to an existing wide-area paging system, in order to meet pent-up demand for service (or worse – to relocate to a new site due to a loss of antenna site), would be difficult if not impossible. This would be catastrophic for the paging industry, especially at a time when paging carriers are operating on extremely thin margins. As a result, areas that might otherwise receive paging service would have to remain unserved (or worse – would become unserved due to the loss of a transmitter site). Such result is contrary to the public interest.

Paging carriers have long provided necessary and valuable communications services to public safety entities (e.g., police, fire and emergency medical services (EMS)), health professionals (e.g., hospitals, physicians, nurses, emergency response teams, etc.), transportation service providers, trucking companies, courier services and others for minimal cost. These users rely on their paging services for critical messages, which for police, fire, EMS and other health care professionals, can mean the difference

between life and death in an emergency. In this regard, many Public Safety Answering Points (PSAPs) have integrated their computer aided dispatch (CAD) systems to provide “text” versions of dispatches to police, fire and rescue personnel in the field. In many instances, these pages contain critical (and often times “sensitive”) information that dispatchers do not wish to verbalize over their dispatch or incident channels due to the ease that their voice communications can be monitored by the public. Additionally, the pagers serve as a back up in those instances where personnel are in “dead-spots” and would otherwise miss a verbal dispatch. And despite the growth of cellular and PCS systems, paging services often provide a more affordable means of communication, with a longer battery life, better building penetration, and farther coverage into less populated areas that do not support an expensive cluster of microcells.

#### **IV. Conclusion.**

Wherefore, for the reasons set forth herein, the Commission should rescind its action and revise Rule Section 90.35(c)(29) to permit the continued licensing of the Industrial/Business Pool paging-only channels on a 25 kHz basis, notwithstanding the provisions of Rule Sections 90.203 and 90.209.

Respectfully submitted,

  
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Filed: August 18, 2003

## **Attachment A**

Mobilephone of Humboldt, Inc.  
L & L Services, Inc. d/b/a Metro Communication Services  
Mobile Phone of Texas, Inc.  
Lubbock Radio Paging Service, Inc.  
Omnicom Paging Plus, LLC  
Oregon Telephone Corp.  
Professional Answering Service  
Teletouch Communications, Inc.  
RCC Inc. d/b/a Radio Com Co.  
Telebeep, Inc.  
Satellink Paging, LLC  
Pensaco Valley Telephone Cooperative  
Clear Lake Telephone Company

## **Declaration of Michael J. Batis**

I, Michael J. Batis, do hereby declare, under penalty of perjury, as follows:

1. Since 1997, I have served as either Director of Engineering or Vice President of Engineering for Teletouch Communications, Inc., a large regional paging carrier serving non-major metropolitan areas in the states of Alabama, Arkansas, Florida, Louisiana, Oklahoma, Mississippi, Missouri, Tennessee, and Texas. In these positions, I have been responsible for design of and implementation of Teletouch's various paging systems, including those that operate on the Part 90 Industrial/Business Pool paging-only channels which are the subject of the foregoing Petition for Reconsideration and/or Clarification.
2. I have reviewed the foregoing Petition for Reconsideration and/or Clarification, and verify the accuracy of the factual statements contained therein which are discussed below.
3. In my capacity as Vice President for Engineering, I am responsible for overseeing the procurement of paging transmitters. Shortly after the Commission implemented its freeze on the licensing of commercial paging systems in 1996, in anticipation of the paging auctions which were ultimately held in 2000, 2002 and 2003, Motorola and Glenayre, the primary manufacturers of transmitters for the paging industry ceased production of their one-way paging lines. As a result, we have been forced to utilize refurbished equipment and/or surplus transmitters that have been purchased from other carriers. Because of this, we are uncertain that we could even find narrowband equipment, much less at an affordable price since the major transmitter manufacturers are no longer investing their research and development resources into one-way paging.
4. As we understand the Commission's Rules, existing wide-band transmitters would not require replacement once narrowband licensing is implemented. For wide-area paging systems, which can range from hundreds or thousands of transmitters per system to as small as 3 or 4 transmitters, the concern is the incompatibility of wideband transmitters simulcasting with narrowband transmitters on the same frequency and the impact that it would have on paging receivers. This is because transmitters in a wide-area paging system are simulcasted, so that that a paging receiver can receive a paging message anywhere within the service area of the particular transmitter without concern for interference from nearby co-channel transmitters. If the transmissions are not perfectly simulcasted, such that one transmitter is even a millisecond off in timing or 1 KHz off in deviation level from a nearby co-channel transmitter, the paging receiver would not be able to reliably decode the desired paging signal due to "heterodyning" between signals. This phenomenon would occur if narrowband and wideband transmitters were mixed in

the same wide-area paging system where coverage areas are overlapped to provide seamless coverage. The result is lost paging messages.

To the best of my knowledge and belief, the factual statements contained herein and which are attributed to this Declaration in the foregoing Petition for Reconsideration and/or Clarification are true and correct.



Michael J. Batis  
Michael J. Batis  
Vice President – Engineering  
Teletouch Communications, Inc.  
110 North College  
Suite 200  
Tyler, Texas 75702

Dated: August 15, 2003

**Certificate of Service**

I, Althea B. Pierce, an employee of the law firm of Blooston, Mordkofsky, Dickens, & Duffy hereby certify that the foregoing Petition for Reconsideration was served on following this 18<sup>th</sup> day of August 2003 via United States mail, first class postage prepaid.

The Honorable Michael Powell, Chairman  
Federal Communications Commission  
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Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy, Commissioner  
Federal Communications Commission  
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The Honorable Michael J. Copps, Commissioner  
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The Honorable Kevin J. Martin, Commissioner  
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Dated: August 18, 2003



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