Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 22 of the Commission's Rules To Benefit the Consumers of Air-Ground Telecommunications Services	)	WT Docket No. 03-103
	)	
Biennial Regulatory Review–Amendment of Parts 1, 22, and 90 of the Commission's Rules	)	

To: The Commission

COMMENTS

Arch Wireless Operating Company, Inc., the Allied National Paging Association, the American Association of Paging Carriers, Metrocall Holdings, Inc. and Weblink Wireless I, L.P. (collectively, "Joint Commenters"), who comprise a representative cross-section of the paging/messaging industry, hereby submit their comments on two issues raised in the Commission's *Notice of Proposed Rule Making* in WT Docket No. 03-103 ("*NPRM*").[1] Specifically, the Joint Commenters support the Commission's proposed amendments to section 1.929(c)(1) of the rules, but oppose the suggestion to delete the term "common carrier" from various sections of Part 22 of the rules. As explained herein, the Joint Commenters submit these comments to retain existing regulatory flexibility for the paging and messaging industry.

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[1] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services; Biennial Regulatory Review – Amendment of Parts 1, 22, and 90 o f the Commission's Rules*, Notice of Proposed Rulemaking, 18 FCC Rcd 8380 (2003).

I. AMENDING SECTION 1.929(c)(1) OF THE RULES TO CLARIFY THAT EXTENSIONS OF PAGING AND RADIOTELEPHONE COMPOSITE INTERFERENCE CONTOURS OVER WATER ARE MINOR MODIFICATIONS IS CONSISTENT WITH COMMISSION AND INDUSTRY PRECEDENT AND SERVES THE PUBLIC INTEREST

The Commission has not historically treated extensions of paging/messaging composite interference contours ("CIC") over water as major modifications necessitating prior Commission approval.[2] Further, the Commission has not traditionally taken such extensions into consideration when processing applications for new or modified messaging facilities.[3] Consequently, paging and messaging carriers routinely modified their systems along coastal areas in order to quickly resolve technical issues and respond to customer demand without first seeking Commission approval for any CIC extensions over water. In 1999, however, the Commercial Wireless Division of the Wireless Telecommunications Bureau ("WTB") released an order (referred to as the *Rinker Order*)

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[2] In fact, Commission precedent indicates that the Commission treated coverage to or extending over water areas as a distinctly different issue than coverage over land. *See Pendleton C. Waugh*, Order, 14 FCC Rcd 14577 (1999) (ocean area off the coastline of California could not be counted in determining whether an applicant for an unserved area met the requirement of proposing a minimum service area of at least 50 continuous square miles of unserved area); *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules,* Further Notice of Proposed Rule Making, 6 FCC Rcd 6158 (1991) (recognizing that the Commission has granted many authorizations for cell sites which have 39 dBu contours extending over water areas from land-based transmitters); *Petroleum Communications, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 399 (Chief, MSD, 1988) ("There is no restrictions as to the size of 39 dBu contour extensions over unclaimed water areas by land licensees."); *Petroleum Communications, Inc. and Gulf Cellular Associates*, Order on Reconsideration, 1 FCC Rcd 511 (1986) (water areas such as the Gulf of Mexico are neither metropolitan statistical areas nor non-MSA areas within the meaning of the Commission's rules); and *Advanced Mobile Phone Service, Inc.,* Memorandum Opinion and Order Granting Application and Designating Applications for Hearing, 54 Rad. Reg. (P&F) 2d 260 (1983) (cellular MSA carriers cannot use a 39 dBu contour extending into an ocean in calculating 75 percent coverage requirements).

[3] *See* 47 C.F.R. § 22.159(a) (Computation of Average Terrain Elevation), which provides that the portion of a radial path extending over water must not be included in the computation of average elevation unless the radial path again passes over United States land; 47 C.F.R. § 22.535(c) (Effective Radiated Power Limits) which provides for VHF channels that ERP is limited in a manner resulting in an average distance to the service contour of twenty miles calculated along eight cardinal radial directions; however, cardinal radial directions for which 90 percent or more of the distance so calculated is over water are excluded; 47 C.F.R. § 22.565(c) (Height-Power Limits) also provides that cardinal radial directions for which 90 percent or more of the distance travels over water are excluded in calculating compliance with applicable height-power limits; and 47 C.F.R. § 22.951 (Cellular Minimum Coverage Requirement) provides that applicants for cellular unserved areas must not propose coverage of water areas only.

in which the WTB purported to change this longstanding practice by stating that extensions of paging/messaging CICs over water were major modifications necessitating prior Commission approval.[4]

The *Rinker Order* engendered a great deal of confusion within the industry and prompted the Personal Communications Industry Association ("PCIA"), which was the paging/messaging industry's national trade association, to file a Request for Rule Change. PCIA asked the Commission to modify section 1.929(c)(1) of the rules to specifically exempt paging/messaging CIC extensions over water from the definition of major modifications necessitating prior Commission approval.[5] The WTB issued a public notice which requested comment on PCIA's request, and simultaneously conditionally waived section 1.929(c)(1) to permit expansion of paging/messaging CICs over water on a secondary basis pending resolution of the issue.[6] The WTB noted that CIC expansions solely over water would not likely pose any risk of interference to land-based systems and that processing major modification applications for such extensions would impose a significant burden on both licensees and the WTB.[7]

On April 16, 2001,[8] two carriers, Arch Wireless, Inc. (predecessor to Arch

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[4] *Karl A. Rinker, d/b/a Rinker's Communications*, Request for Declaratory Ruling, 14 FCC Rcd 19546 (WTB, 1999). Karl Rinker d/b/a Rinker's Communications held a 152.03 MHz CMRS authorization in the Portland, Maine area. Rinker filed an application with the Commission to install a base station transmitter which would have extended its CIC over *both* land and water. The Commission's application freeze then in place precluded *any* CIC extensions. On January 23, 1998, Rinker requested a declaratory ruling seeking a determination that increases to CICs extending over the Atlantic Ocean were minor modifications pursuant to Section 1.929(c)(1) of the rules. The Policy and Rules Branch of the Commercial Wireless Division of the WTB denied Rinker's request and held that *any* proposal that would extend a paging system's existing CIC would be deemed a major modification precluded by the paging application freeze, regardless of whether the extension was over land or water.

[5] The Personal Communications Industry Association, Request for Rule Change (March 9, 2000).

[6] Wireless Telecommunications Bureau Seeks Comment on Request for Rule Change and Conditionally Waives Section 1.929(c)(1) to Permit Expansion of Paging Contours Over Water on a Secondary Basis, Public Notice, DA 01-688 (rel. Mar. 15, 2001).

[7] *Id.*

[8] The *NPRM* incorrectly states that no one filed comments regarding PCIA's request. *Id.* at ¶52.

Communications Group, Inc.) and Verizon Wireless (on behalf of its messaging subsidiary, Verizon Wireless Messaging), filed Comments supporting PCIA's Request. They explained that classifying CIC extensions over water as minor modifications afforded messaging and paging carriers the much needed flexibility to quickly relocate or adjust transmitting facilities along coastal areas in order to maintain and improve coverage threatened by downed towers during inclement weather, failed lease negotiations and terrain-related propagation problems.[9] No one opposed PCIA's Request or the comments filed by Arch and Verizon.

The Commission has now teed up the issue for final resolution in the *NPRM*. The Commission notes that its "records indicate that [it has] not received any interference complaints arising from the conditional waiver of section 1.929(c)(1)."[10] Consequently, it proposes to amend section 1.929(c)(1) of its rules to specify that expansion of site-based paging and radiotelephone CICs over water on a secondary, non-interfering basis to existing geographic area licensees is a minor modification and that licensees can make such extensions on a permissive basis.[11]

The Joint Commenters fully support the Commission's proposed solution. First, it is consistent with Commission and industry precedent, as explained above. More importantly, to classify such extensions as major modifications would seriously hamper the ability of paging and messaging carriers to quickly respond to changing consumer

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[9] The Commission qualifies certain modifications as minor in order to conserve both Commission and industry resources. *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 9 FCC Rcd 6513, 6519, ¶ 25 (1994) ("We note that generally the record supports eliminating the notification requirement for most additions and modifications and that our doing so will save substantial industry and Commission resources."); *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 7 FCC Rcd 3658, 3661, ¶ 17 (1992) ("This proposal is intended to conserve both Commission and industry resources.").

[10] *NPRM* at ¶ 52

[11] *Id.* at ¶ 52-53.

demand and unexpected disruptions to service along coastal areas. Further, as the WTB has already noted, requiring pre-approval for such extensions would impose a severe burden on both the industry and the Commission, but with no commensurate benefit to the public.[12]

On a separate but related issue raised in the *NPRM*, the Joint Commenters think it is counterproductive and unnecessary to require incumbent paging/messaging licensees to file an application or notification with the Commission in order to provide a geographic area licensee with the technical parameters of a CIC extension over water. Such information is already provided when so requested by the geographic area licensee. The Joint Commenters believe that requiring such a filing would in fact reduce the flexibility and efficiencies created by not requiring pre-approval of such extensions.

II. THE COMMISSION SHOULD NOT DELETE THE TERM "COMMON CARRIER" FROM PART 22 OF THE RULES

In paragraph 28 of the *NPRM*, the Commission states that it is proposing to delete what it terms an unnecessary "restriction" in Section 22.7 of the rules to licensees under Part 22 that are existing and proposed "common carriers." The Commission similarly proposes to delete use of the term "common carrier" throughout Part 22 and generally to replace it with the term "licensee."[13]

Joint Commenters respectfully submit that although perhaps unintentional, the *NPRM* characterizes the term "common carrier" as a "restriction" on licensees under Part 22. The Joint Commenters strongly believe that the term is more properly a description of the legal and regulatory status of a Part 22 licensee, a status which continues to retain considerable legal and regulatory significance to the common carrier paging and

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[12] *Id.* at ¶ 54.

[13] *See, e.g., NPRM at* ¶¶ 24 (§22.3(b)); 29-30 (§22.99); 36 (§22.351).

messaging licensees holding Part 22 authorizations. [14] Joint Commenters do not object in general to an attempt by the Commission to improve the wording of Part 22; however, the Joint Commenters believe eliminating the term "common carrier" as a description of the legal and regulatory status of common carrier entities holding Part 22 authorizations – particularly paging and messaging carriers – would have several unintended and negative consequences for such licensees.

As an initial matter, explicit recognition of paging and messaging carriers as "common carriers" and "telecommunications carriers" historically has come only with great difficulty and extensive litigation; and it continues to be important in the carriers' interconnection negotiations with Incumbent Local Exchange Carriers (ILECs). Prior to enactment of the Telecommunications Act of 1996, for example, the Commission had to repeatedly reaffirm the interconnection rights of paging (and later cellular) carriers arising out of their co-carrier or "common carrier" status.[15] The Commission has had to continue doing so even after adopting rules to implement the Telecommunications Act of 1996.[16] Against this long and bitterly fought background, there is no reason or justification for the Commission to remove the explicit recognition of paging and messaging carriers and other Part 22 licensees as "common carriers" and

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[14] The concept of a "common carrier" and the rights and obligations flowing from this legal and regulatory classification are steeped in American jurisprudence. *See, e.g., NARUC v. FCC,* 525 F. 2d 630, 640 (DC Cir. 1976) *cert. denied*, 425 U.S. 992 (1976) (noting the "long and complicated history of that concept").

[15] *See, e.g., Need to Promote Competition and the Efficient Use of Spectrum for Radio Common Carrier Services,* 2 FCC Rcd 2910 (1987); *Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carriers,* 59 Rad. Reg. 2d (P&F) 1275 (1986) (ruling on interconnection complaints by paging and cellular carriers); *Memorandum of Understanding,* 80 FCC 2d 352 (1980)(revised interconnection agreement reached after additional negotiations under FCC auspices); *Domestic Public Land Mobile Radio Service,* 63 FCC 2d 87 (1977) (model interconnection agreement accepted after negotiations conducted under FCC auspices).

[16] *See, e.g., TSR Wireless, LLC v. U S West Communications, Inc.,* 15 FCC Rcd 11166 (FCC 2000), *aff'd sub nom. Qwest Corporation v. FCC,* 272 F.3d 462 (D.C.Cir. 2001) (reaffirming paging carrier rights to treatment as "telecommunications carrier" under 1996 Telecommunications Act).

"telecommunications carriers."

This conclusion is further underscored by Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (signed August 10, 1993), which created the "Commercial Mobile Radio Services" classification under the Communications Act. That section, in part, mandates that a "person engaged in the provision of a service that is a commercial mobile service shall . . . be treated as a *common carrier*."[17] Similarly, in Section 6002(d)(3), 107 Stat. 397, certain uncodified requirements governing the implementation of the CMRS classification include the requirement that the Commission,

> in the regulations that will . . . apply to a service that was a private land mobile service and that becomes a commercial mobile service . . . , shall make such other modifications or terminations as may be necessary and practical to assure that [Part 90] licensees . . . are subjected to technical requirements that are comparable to the technical requirements that apply to [Part 22] licensees that are providers of substantially similar *common carrier services* (emphasis added).

By deleting the references to "common carrier" in Part 22, Joint Commenters respectfully submit that the Commission would be improvidently blurring the regulatory benchmark which 1993 OBRA took great pains to establish.

Finally, Joint Commenters point out that the privacy provisions of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Public Law 104-191 (August 21, 1996), which took effect on April 14, 2003, provide yet another reason for retaining the explicit classification of paging carriers as "common carriers" and "telecommunications carriers" under Part 22 of the rules. HIPAA privacy rules regulate

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[17] 47 U.S.C. §332(c)(1) (emphasis added).

"covered entities" such as hospitals and other health care providers, as well as "business associates" of covered entities. One of the exceptions to application of the privacy regulations is when a business associate merely acts as a "conduit" for the transmittal of Protected Health Information ("PHI"). As a "common carrier" and "telecommunications carrier," the status of a paging carrier as a "conduit" of PHI, and hence its exemption from the privacy rules, is unassailable. Deleting that explicit recognition under Part 22 would unnecessarily complicate the paging industry's compliance with HIPAA, and should be avoided for that reason alone.

III. CONCLUSION

Based on the foregoing, the Joint Commenters respectfully request that the Commission amend Section 1.929(c)(1) of the rules to clarify that extension of paging and messaging CICs over bodies of water, as the term bodies of water is defined in the *NPRM,* are minor modifications that can be made on a permissive basis. Further, the Joint Commenters urge the Commission to retain the term "common carrier" in its Part 22 rules.

Respectfully submitted,

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