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ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own Motion to consider revisions to Rule 18(o) of the Rules of Practice and Procedure in furtherance of the Commission's continuing regulation of radiotelephone utilities.	OII 83-03-01 (Filed March 2, 1983)
And Related Matters.	Application 82-06-31 Application 82-10-66 Application 82-12-43 Application 82-12-70 Application 82-12-71 Application 83-01-39 Application 83-01-41 Application 83-01-47 Application 83-02-10 Application 83-02-30 Application 83-02-31 Application 83-02-32 Application 83-02-34 Application 83-03-77 Application 83-04-34 Application 83-06-38 Application 83-06-39 Application 83-07-41

O P I N I O N

This is an investigation on the Commission's motion to consider (1) revisions to Rule 18(o) of the Commission's Rules of Practice and Procedure which may be necessary or desirable due to recent changes in the Federal Communications Commission (FCC) policies respecting the issuance of permits to radiotelephone

utilities (RTU's)[1] permitting them to construct noncellular one-way radio paging systems, and (2) related matters. Rule 18(o) sets forth, in part, the criteria by which an application for an RTU certificate will be judged.

Named as respondents in the proceeding are the 51 RTUs presently certificated by the Commission as well as the applicants whose applications for RTU certificates are listed in the heading of this decision. Those applications have been consolidated with the OII proceeding to the extent necessary to adjudicate common issues.

The OII was served on each of the respondents and other interested persons. They were invited to file written comments with the Commission addressing the issues delineated in the OII and, later, the Commission staff's Proposed Modified Rule 18(o). Written comments were received from Allied Telephone Companies Association (Allied), which claims to represent 34 RTUs; ICS Communications (ICS); Orange County Radiotelephone Service, Inc. (Orange); The Pacific Telephone and Telegraph Company (PT&T); American Paging, Inc. of California (American); Dial Page, Inc. (Dial); Page America Communications of California, Inc. (PAC); Pacific Paging; MCI Airsignal of California and its parent company (MCI); Cal Autofone; Kidd's Communications, Inc. (Kidd's); Radio Electronic Products Corporation (Repco); Salinas Valley Radio Telephone Co. (Salinas); TelPage, Inc.; R.C.S. Inc.; Rocky Top Enterprises, Inc. (Rocky); and the Commission staff.

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[1] The definition of a RTU is contained in Public Utilities (PU) Code § 4901-2. Generally speaking, a RTU refers to anyone, other than a wireline telephone company, who provides domestic public land mobile radio service (DPLMRS) to the public. Some California RTUs also provide Rural Radio Service, and some offer VHF Maritime Service, but these services are outside the scope of this investigation.

The specific issues delineated in the OII to be considered in the proceeding are listed in Appendix A.

Rule 18(o) is set out in Appendix B.

Background

Both the FCC and the Commission have spheres of regulatory authority over the operations of RTUs.[2]

Most of the applications listed in the heading of this decision seek a certificate from the Commission to engage in one-way paging service, though several of the applications listed seek authority to initiate a two-way mobile radiotelephone service. The listed applications, all but one of which are protested, in all probability represent only the proverbial "tip of the iceberg" of the eventual number of applications for RTU paging certificates to be filed with the Commission in the near future. Only 6 of the 18 applications appear to have their relevant FCC permits.

New FCC policies, as well as recent technological advances in the area of radiotelephony, have caused a great surge in the number of applications to be filed with the FCC for one-way radio telephone paging construction permits. To date, there are over 65 FCC applications which collectively seek to establish over 350 base stations in California. Additional FCC applications are continuously being filed. If these applications are granted there will be concomitant applications[3] before this Commission to be processed in a very short time.

In the OII the Commission expressed its concern about the administrative burden facing it as the result of the great number of

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[2] See Radiotelephone Utilities (1978) 83 CPUC 461 which confirms and defines the Commission's jurisdiction and power to regulate RTUs.

[3] The FCC has reaffirmed the appropriateness of state economic regulation of local RTU services, expressly including "decisions concerning entry and exit of paging common carriers." See FCC Docket 80-183 et al., Fed. Reg. Vol. 47, No. 109, p. 24567, June 7, 1982.

expected RTU paging applications and tentatively judged that handling the applications on an individual basis would be wasteful, duplicative, and burdensome. The Commission also expressed concern that the FCC's new open entry policy, which accompanied the establishment of additional channels, may be inconsistent with this state's policy designed to control entry of RTUs. Strict enforcement of the public need criteria and Rule 18(o) may leave many companies holding FCC permits for the new channels without a concomitant Commission certificate, whereas a total relaxation of those criteria may result in a great proliferation, in many areas, of separately owned RTUs with smaller subscriber bases and may lead to unreliable service to the consumer. The Commission, therefore, initiated this investigation to seek to establish a framework for reconciling new federal policy with existing state policy and to formulate guidelines designed to foster the RTU industry's future development in the new environment by defining the "rules of the game" on the state level.[4]

FCC Policy Changes

Since the FCC has exclusive jurisdiction to license the use of radio spectrum, a person wishing to initiate a new RTU service or expand an existing RTU service must make application to the FCC for a permit to construct a radio transmitting station. The permit, when issued, designates, among other things, the base station site(s), the control station site, and the radio frequency or frequencies which must be used in broadcasting from and/or to the base station(s). Permits expire if construction of the system is not completed within 8 months after issuance, or an extension thereof.

Heretofore, the FCC allocated only 6 channels for exclusive use in RTU paging operations (though some RTUs operating mobile radiotelephone service use their mobile radiotelephone frequencies to

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[4] This is not the first time the Commission has had to seek ways to reconcile its policies with those of the FCC regarding the regulation of RTUs. See Malis v General Telephone (1961) 59 CPUC 110, 115-116.

give a secondary paging service). Also, a necessary element in an application for a RTU paging permit was a showing that a grant of the application would "serve the public interest, convenience, and necessity".

Recently, the FCC opened 32 additional low-band channels and 37 additional channels in the 900 MHz band for exclusive use in local public paging operations.[5] Permits for these new and old paging channels are beginning to be issued by the FCC on the basis of one channel per marketplace per applicant. This could result, conceivably, in up to 69 additional separate RTUs offering paging service on disparate frequencies in a single marketplace. The permits are also being issued solely by reference to technical criteria and without reference to public need, convenience, or necessity[6] and without reference to channel compatability between different areas. The FCC is not bound by requests for specified frequencies in applications for frequency allotment in the 900 MHz local public paging band.[7] The FCC deems the service area in each 900 MHz application to be within a radius of 20 miles of the base station site applied for.[8] In addition to the 69 new paging channels, the FCC has recently allocated several sets of 24 new two-way mobile radiotelephone channels, each set to be used as a block and shared among all qualified applicants in a given service area. One such set is allocated to San Francisco and one to Los Angeles.

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[5] 47 CFR 22.501(a)(1), (a)(4), and (d); 47 CFR 22.501(p)(1). The latter regulation also allocates 3 additional channels in the 900 MHz band for nationwide network paging. In FCC 83-146 the FCC preempted state authority with respect to entry, technical, and exit regulation of the nationwide network paging operators.

[6] 47 CFR 22.525. However, under this regulation a RTU who applies for an additional paging channel to be used at its existing base station must show that its existing facilities will not accommodate additional paging growth before the FCC will issue it a permit to add an additional paging channel to its base station.

[7] 47 CFR 22.501(p)(2).

[8] 47 CFR 22.15(j)(8).

RTU Operations in General

RTUs offer one or two types of local radio services: one-way paging service (tone-only, tone-and-voice, or digital readout) and/or two-way mobile radiotelephone service. The plant of a RTU consists of one or more base stations connected to a control station. A base station is the site of the radio antenna(s) and other radio equipment and is located on commanding terrain. The control station is the site from which operations of the system are controlled as well as the point where the RTU system interconnects with a wireline telephone company system. The control station is also the message center for the system and often serves as the business office of the RTU.

The service area of a RTU is the theoretical ground area, depicted by a contour line (service contour) on a map filed with the Commission, throughout which a radio signal on a specified frequency from a base station, or network of base stations, can be received with a prescribed degree of reliability as to signal strength and frequency. The extent of ground area embraced in a service contour depends on many factors, such as number and location of base stations, type of terrain, altitude of antenna(s), station power, and radio frequency. The paging service area requested in A.82-10-66 employing one base station is approximately 25 miles in diameter, that in A.83-03-77 also employing one base station is approximately 20 miles in diameter, and that in A.83-01-47, employing a series of six base stations located at various points from Vallejo on the north to the vicinity of Santa Cruz on the South, is roughly 100 miles by 50 miles. In A.83-04-34 applicant desires to extend its present service area, which takes in a land area within a line drawn from Malibu to Newhall to San Bernardino to San Clemente, all the way south to San Diego.

Interchange of traffic between two local RTU paging systems using disparate broadcasting frequencies assigned exclusively to paging is not workable due to the fact that most pagers do not have

frequency agility, i.e.. pagers are preset to receive only a single channel. In addition, in assigning paging channels to separately-owned RTUs, the FCC will not assign the same frequency to contiguous RTUs because of interference and other problems. On the other hand, the interchange of traffic between two separately-owned RTUs operating mobile radiotelephone service over disparte frequencies in contiguous or close-by areas is workable because the mobile units have frequency agility, i.e., are capable of operating on a range of channels.

Commission Policy Re Proof of Need for Service

RTUs are subject to the same general statutory certification requirements applicable to wireline telephone companies. (PU Code § 1001). Upon application for an RTU certificate the Commission "may...issue the certificate as prayed for...as in its judgment the public convenience and necessity may require; provided, however, upon timely application for a hearing any person entitled to be heard thereat, the Commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon". (PU Code § 1005(a)). In practice, the Commission has declined to adopt a policy of awarding exclusive franchises to RTUs, but instead has pursued a policy of limited entry while at the same time encouraging the development of limited competition both among existing RTUs and between RTUs and wireline telephone companies who offer radiotelephone service.

Rule 18 sets forth the data which must be contained in an application for an RTU certificate. Rule 18(e) requires any applicant for an RTU certificate to furnish in its application (and hence prove) facts which show that public convenience and necessity require the proposed activity applied for.

But, according to present Rule 18(o), if the applicant is an existing RTU which seeks to expand its present service area into the service area of another RTU and the other RTU protests the

application, then the applicant must also show that present service in the proposed extended area is unsatisfactory and that an attempt was made to reach an intercarrier agreement with the protestant.

Protested application proceedings often include lengthy hearings and can consume many months.

In the recent past the Commission has not required an applicant to show that it possessed an FCC permit as a prerequisite to filing an application for a certificate.

Summary of Written Comments
On Issues in the OII

The comments emphasize both the changes taking place in the industry and the necessity for prompt and appropriate responses by the Commission. They differ, however, as to the form that the Commission's response should take. Following is an abstract of those comments:

Pacific Paging

Pacific Paging is a first-time applicant for RTU service in California though it has conducted RTU operations in Oregon for many years in an unregulated atmosphere One of the applications listed in the heading of this decision was filed by Pacific Paging. It contends there is no valid social, economic, or technical reason for the economic regulation of RTUs by the Commission. In its written comments it discusses the various criteria for public utility regulation--public good, cost of production, scarce resources, critical to survival, economies of scale--and concludes that the RTU paging business does not fit any of these criteria. It recommends completely open entry for the RTU paging business in California and although it does not specifically recommend a repeal of Rule 18(o), this is implicit in its overall recommendation.

American

American is a first-time applicant for RTU service in California though its parent company owns companies which provide radio paging service in other states. Three of the applications

listed in the heading of this decision were filed by American. American recommends open entry into the paging market. It argues that the Commission should no longer require an applicant for new or expanded paging service to establish inadequacy of existing service. However, American would require existing radiotelephone utilities to file a traffic load study when applying for a new frequency in order to guard against "warehousing" of frequencies by existing RTUs. American also emphasizes that proper use of assigned frequencies is a key issue in this proceeding. It argues that a goal of any adopted regulation must be to serve the public interest. Deregulation by the Commission in the transportation field is cited, with analogies made between radio paging carriers and water and truck carriers. "Each is engaged in a business which does not involve large capital outlays of permanently located equipment; each provides a service where the customer can conveniently make a selection; each operates in an area where the competitive forces of the marketplace provide a large measure of protection against poor service and excessive rates to the public, and where, therefore, restrictive regulation is unnecessary."

MCI

MCI is an RTU which presently provides RTU service in 10 market areas in the State. Six of the applications listed in the heading of this decision were filed by MCI. It favors a streamlined application process that would allow for maximum competition among providers of paging services and suggests that there should only be two requirements for applications for paging certificates: (1) The applicant has an FCC construction permit or has filed for one and is likely to obtain one; (2) and the proposed services are different in terms and conditions, area of coverage or features of service, or will otherwise promote competition. It asserts the radiotelephone business has the competitive potential to be largely self-regulating, with market forces sufficient to safeguard the public from speculation, wasteful duplication of facilities, and utility failures. As a nonessential service, "the public convenience and

necessity does not command insulating one-way mobile communications carriers from competitive forces as thoroughly as providers of necessities are protected." The high level of statewide demand would eliminate the need for adequacy of service tests, individual showings of need, or other demand-related tests. MCI cites the costs of these requirements as unnecessary for the company and the ultimate consumer, with no corresponding benefits from compliance. It claims that their cost in prosecuting an application often approaches the cost in establishing a new paging facility, as carriers contest applications on any imaginable ground. MCI also questions any practical application of "unsatisfactory" as a test, given the diversity of paging techniques, options, and consumer preferences. It also supports competition with the arguments that economic self-interest of investors can be sufficient regulation of financial fesibility, engineering review at the state level is redundant, given FCC requirements, and that other states have substantially reduced or eliminated the regulation of radiotelephone carriers successfully, notably New York, Michigan, and Florida.

ICS

ICS is an RTU which provides mobile radiotelephone paging service and microwave service in major communities of San Bernardino, Riverside, Los Angeles, Orange, San Diego, and part of Ventura County. ICS supports state legislation that would fully deregulate the radiotelephone utility industry. Barring action by the legislature, ICS Communications recommends that the Commission abolish Rule 18(o) and Rule 10.1 and exercise minimal supervision mediating disputes and interconnection issues. ICS further recommends that paging services be provided upon Advice Letter filings and tariffs without evidentiary hearings. The above recommendations are based upon many of the reasons stated by the other proponents of deregulation or limited regulation.

PAC

PAC is a first-time applicant for RTU service in California, though its parent company has been engaged in the business of marketing paging services at various points in the United States since 1976. PAC has filed three of the applications listed in the heading of this decision. PAC favors open competition in the RTU paging markets to the extent that it urges the Commission to seek legislation to deregulate paging, at least with regard to entry and exit questions. It cites innovations in paging technology, marketing changes, and declining costs as the causes for large demand increases now and in the future. The public interest would be served best by prompt action to streamline the application process, and encourage competition among a large pool of providers, making a wide variety of service and price options available to consumers. Administrative delays, it explains, raise the costs of applicants tied up in this proceeding, and may cause the FCC construction permits of many to lapse. "Foreclosing" use of FCC-allocated channels by state permit denial or extensive delay may invite the FCC to preempt state jurisdiction in the radiotelephone field.

PAC recommends that the Commission modify its rules to require an applicant for a paging certificate to make a minimum threshold showing that (1) describes the applicant's proposed facilities and operations, (2) sets forth the level of proposed rates, (3) states the applicant's financial qualifications, (4) customers are likely to use the proposed service, and (5)applicant has an FCC construction permit. Subsequent to this showing the burden should shift to a protestant to demonstrate that the competition may damage the protestant contrary to the public interest.

Dial

Dial is a first-time applicant for RTU service in California. One of the applications listed in the heading of this decision was filed by Dial. Dial suggests that the Commission must

recognize the inherent significant market strength that large interstate radiotelephone utilities and wireline telephone companies have compared to locally-owned single market RTUs. Based upon this analysis, Dial would have the Commission allow open entry by "nondominant" applicants, while continuing the provisions of Rule 18(o) for "dominant" RTUs and wireline telephone companies. Dial recommends that "nondominant" radiotelephone utilities should be required to show three basic qualifications for obtaining a certificate: proper engineering, economic feasibility, and quality of service. Additionally, FCC authorization should be obtained prior to Commission certification. Dial points out that Northern California Power Agency v PUC (1971) 5 Cal 3d 370, 96 Cal Rptr 18 requires that this Commission consider the anticompetitive implications of applications for certification and that to guard against empire building by dominant applicants the Commission should enforce Rule 18(o).

Allied

Allied points out that there is already substantial competition in the provision of RTU service to the public as evidenced by the fact that few if any RTUs have increased their paging rates over the past ten years, though many new services and service improvements have been introduced. Allied believes that the present public convenience and necessity criteria should be broadened by the Commission setting out additional specific criteria by which to judge RTU applications, namely, new or innovative services, increased service to the marketplace, improved competition, lower rates, or promotion of the growth of wide area, channel-compatible systems. Allied favors continued and even more intense scrutiny by the Commission of wireline interconnection terms and charges but suggests a relaxation of the Commission's regulation of RTU equipment and service rates in competitive situations, except when predatory pricing is indicated.

PT&T

PT&T is a wireline telephone company which provides radiotelephone service in certain parts of the State. It does not propose any revisions or modifications of Rule 18, with the exception of proposing one addition: Coordination of the Commission filing and the FCC filing, if there is no substantial opposition before the FCC. In the absence of FCC level opposition, the Commission can process the certificate filing, thus providing expeditious and simultaneous processing. Engineering data, per Rule 18(o), should still be submitted, but it asserts that a copy of the FCC construction permit application contains all of the necessary engineering information.

Orange

Orange claims to be one of the original RTUs certificated by the Commission. It favors limiting competition. It opposes competition generally, citing the equipment, servicing, and other overhead costs associated with radiotelephone service as "not conducive to free entry and sharp competitive practices." Its position is that efficient and effective service is best provided by regulatory intervention. It suggests that Rule 18 should be clarified to apply equally to existing and new carriers. Another modification suggested would add guidelines for the type of proof necessary to show a given service is unsatisfactory or inadequate. It adds that an application should be keyed to receipt of an FCC construction permit and that Rule 18(o) should be applied across the board.

Commission Staff

The staff believes that the dynamic nature of the radiotelephone industry and the recent expanded spectrum allocation by the FCC make the current Commission criteria for a certificate overly restrictive, but instead of allowing open entry it proposes a middle ground. The staff does not dispute the arguments for open entry. Rather it believes that the need for consumer protection and

for the orderly growth of the paging service and the radiotelephone industry in California mandates continued, though significantly less stringent, regulation.

The staff reasons as follows:

"The possible impacts upon consumers and society of unreliable services, fraudulent business practices, and genuine bankruptcies are valid and compelling reasons for continued regulatory oversight of the industry. These are too often made light of in a rush to a competitive environment. Paging services are not necessarily a luxury as some commentators suggest. They have become a necessity to professionals such as physicians and are very much involved with public safety in dispatching emergency services. It is argued that the competitive marketplace will take care of the customers of the company with inadequate technical or financial capabilities to provide adequate service. This approach fails to show concern for the market as a whole. The FCC decision allocating new channels to paging services will allow, from a technical standpoint, as many as 30 additional paging carriers on top of the 10 currently authorized in most markets. This is in total disregard for the ability of the particular market to absorb the additional radiotelephone operators. For example, Bakersfield is authorized as many paging channels as Los Angeles. Should the Commission take the risk that the entire market will fall into disarray? Is there a risk that in a short time one or two large statewide paging service carriers will drive all of their smaller competitors out of the market creating a monopoly situation? Conversely, will there be such a turnover of carriers that the consumer cannot rely on adequate service? Additionally, there is the possibility that some applicants will attempt to obtain frequencies, not for legitimate radiotelephone use, but rather to hold them for resale. These types of concerns justify a continued oversight of a growing industry. Additionally the consumer benefits from continued oversight of such areas as arbitration of interconnection agreements between radiotelephone companies and wireline companies.

"In recommending continued regulation of the provision of paging services, the staff is not suggesting a 'business as usual' approach. On the contrary, the staff believes the emphasis must shift from 'restricted entry' regulation to the regulation of 'orderly industry growth.' In recognition of this approach and the practicalities of dealing with the expanded FCC allocations, the staff has attached herein a proposed new Rule 18(o).

"The significant features of this new rule are as follows. The staff recommends that no consideration be given to an application for a paging service or radiotelephone application until the applicant has received an FCC construction permit. There are competitive applications at the FCC for many of the paging channels allocated by the FCC. It would be a waste of this Commission's time, and indeed, an impossible task for this Commission to review all of the applicants proposing paging service in California. Limiting applicants before this Commission to those with FCC construction permits will allow for a manageable regulatory program.

"The staff recommends deletion of Rule 18(o)(2)(i) and (ii) which require an applicant to show that present service in an area is unsatisfactory and that the applicant attempted to reach an intercarrier agreement with a current provider of service in the area. This would be replaced by a showing that the proposed service will be responsive to a public demand or need. Once this was accomplished the burden would shift to a protestant to establish that the granting of an application will so damage existing service or the particular marketplace as to deprive the public of adequate service. This is a major change in policy from restricted entry to a policy of orderly growth.

"Finally, the staff believes it's in the public interest to require a 'threshold' showing of financial and technical capabilities by an applicant."

The staff proposes that Rule 18(o) be modified to read as set forth in Appendix C.

After receipt of the Staff Proposed Modified Rule 18(o) the assigned Administrative Law Judge (ALJ) requested comments on the modifications from all respondents and from those who had previously filed written comments in the proceeding.

Summary of Comments on Staff Proposed Rule Modifications

Staff Proposed Modification

> "(1) When the applicant obtains the relevant construction permit from the FCC, it shall thereafter submit its application..."

American, ICS, MCI, and PT&T consider as too stringent the staff's proposal that an FCC permit be made a prerequisite to the filing of an application with the Commission for a certificate. Their principal argument against the staff's proposal is that there is a serious risk an applicant will lose its FCC permit because of delays in the processing of its application before the Commission and that a delay in granting the certificate will delay the ultimate rendition of needed service. American suggests that in lieu of the staff proposal the rule should provide as follows:

> "(1) Prior to submitting an application to this Commission for a certificate of public convenience and necessity, the applicant must either obtain a relevant construction permit from the FCC or demonstrate to the Commission that its application is beyond the 60-day cutoff for conflicting applications and that of more than two conflicting applications for a permit to construct facilities for the use of the same frequency are on file with the FCC..."

(American states that conflicting applications before the FCC for the same frequency must be filed with the FCC within 60 days of the filing date of the first application.)

MCI recommends that the only prerequisite to filing an application with the Commission should be that the application must have applied to the FCC for a relevant permit.

PT&T would go one step further than MCI and require an applicant to show that its FCC application has no substantial opposition. PT&T also suggests that in extreme cases the Commission should permit construction (at applicant's risk) but not operation of the service.

ICS disfavors any prerequisite to the filing of an application with the Commission.

Allied and Cal Autofone recommend that the rule should be made clear that failure to file an application within 30 days after the applicant receives its FCC permit, as required by PU Code § 4907 will cause the application to be denied. Salinas and RCS support the comments of Allied throughout.

Other written comments do not specifically address this proposed rule modification.

Staff Proposed Modification

"(1) ...the radio service areas of adjacent utilities furnishing mobile radiotelephone service will be shown on a fully legible engineered service area contour map..."

American contends that any RTU serving an adjacent area should be required to submit its service area contour map to a prospective applicant prior to the filing of the application. Unless adjacent carriers furnish such a map, the applicant will be put to the great expense of having to design those maps in order to do its own maps. American suggests the following addition to staff's proposed modification:

"(1) . . . To enable applicant to prepare its map it shall be the obligation of utilities furnishing radiotelephone service in adjacent areas to submit to the applicant their service area contour map depicting their respective service areas..."

Staff Proposed Modification

"(2) Each such application shall address the following matters in a substantial manner and with particularity, consistent with the scope of the authorization sought:

"(i) Demonstration that the proposed service is responsive to public need and demand."

American disagrees with the staff's rationale for retaining restrictions upon entry into the paging market. However, if the Commission insists upon a demonstration that the proposed service is "responsive to the public need and demand" American suggests that the Commission supplement this rule with a statement that an applicant can demonstrate that the proposed service is responsive to the need and demand in one of the following ways:

"1. The submission of letters of support from prospective customers indicating that the customer would use applicant's service.

"2. The submission of a list of potential customers who have indicated that they will use applicant's services, coupled with the statement that these customers have been served with a copy of the application.

"3. Submission of Market Studies demonstrating demand for applicant's services, along with a statement that interviewees were given applicant's types of service, service area, and price."

American believes that the staff rule retains remnants of public convenience and necessity and raises unnecessary problems.

Allied concurs with the staff proposed Rule (2)(i) but believes that existing carriers desiring to expand their present service areas substantially should continue to be required to reach intercarrier agreements. This latter requirement will ensure compatibility between neighboring areas which is in the public interest.

Cal Autofone believes that an applicant, in order to serve public need and demand not currently being served, must offer some type of service not being offered by the existing carrier, and that

upon the grant of a certificate the RTU be required to construct such facilities as necessary to serve the public need and demand as outlined in the application. Failure to construct and offer such service should cause the certificate to be withdrawn. It suggests that the subject rule be so amended.

ICS, which states that it has been a proponent of strong regulation of RTUs in the past but now take the opposite view because of the recent transformation of the RTU industry, believes that an advice letter filing should be all that is necessary for an RTU to enter into the business.

Kidd believes that the Commission should limit entry on a population based plan.

MCI is in favor of eliminating the "unsatisfactory service" rule in expansion cases. It also suggests that in lieu of the staff proposed Rule (2)(i) that the following be inserted:

> (i) A showing that applicant will provide a new service or enhance competition in the area of coverage.

MCI contends the proposed staff Rule 18(o)(2)(i) "would completely undermine the deregulatory objectives urged by the staff throughout its comments.

PAC stands by its contention that no useful purpose is served by Commission regulation of exit and entry of paging markets. However, if the Commission does retain jurisdiction of exit and entry PAC goes along with the staff proposed rule.

REPCO supports the staff proposal but believes that the rule should contain an "intercarrier agreement" provision.

RCS supports the basic position of the staff and shares its concern relative to impacts upon consumers of totally unregulated service.

Rocky espouses strong Commission regulation of the RTU industry.

Salinas supports the comments of Allied and would oppose any dismantling of the Commission's regulatory role.

Tel-Page generally supports the staff analysis of Rule 18(o) and the comments.of Allied. Tel-Page believes that it is in the public interest to have regional and state networks and that to achieve this purpose the "intercarrier agreement" provision must be retained.

Staff Proposed Modification

(2)(ii) Technical feasibility of the proposed system and the technical competence of the applicant.

The two respondents who specifically addressed this rule feel that the submission of the engineering and operational data furnished to the FCC in connection with the application for a construction permit should be deemed sufficient as the area of technical feasibility and competence falls basically within the purview of the FCC under current law.

Staff Proposed Modification

(2)(iii) Description of the proposed service including terms, conditions, area of coverage, quality, and features of service, and differences from presently provided service, if any, in the proposed service area.

American urges the deletion of the phase "differences from presently provided service, if any." American believes the "inclusion of a requirement for uniqueness is a regression from the traditional standard of public convenience and necessity and adequacy of service."

Cal Autofone believes that the words "if any" should be omitted. It reasons that in order to show public need and demand, the proposed service must be different from the service presently provided.

Staff Proposed Modification

(2)(iv) Financial responsibility of the applicant.

The only comment with respect to this proposed modification is that an applicant should be permitted to prove its responsibility through submission of its financial statement, its estimated cost of construction, and that it has the financial ability to meet those estimated costs of construction.

Staff Proposed Modification

(2)(v) Economic feasibility of the proposed service in the market to be served, taking into consideration the market share of other providers in the area.

American believes this requirement "is a throwback to the days of public convenience and necessity and is therefore inappropriate and unnecessary" in view of the very large potential market for paging service in the country.

Cal Autofone believes that "Assurance should be made that the new applicant will indeed serve the public interest, i.e., offer new services, new rates, new service area and, in addition, will not harm the public interest by causing detriment to the existing carriers."

ICS believes that since the staff proposed rule dealing with market share prescribes no specific guidelines it deals in generalities or intangibles and can only perpetuate regulatory lag and regulatory inconsistency.

MCI considers the threshold showing of "economic feasibility" as required by the staff rule to be extremely costly and burdensome on the applicant. The requirements of such a showing would "perpetuate extensive regulation in the precise areas where the marketplace will endure self-regulation" and should not be included in the rule.

Staff Proposed Modification

(3) Should an existing radiotelephone utility protest such an application, a protestant shall assume the burden of proof of establishing that the grant of authority is not in the public interest and will cause irreparable economic harm to the protestant. The protest must contain facts, set forth in a substantial manner and with particularity, which will establish the aforementioned burden of proof. Protestants of a general nonspecific nature will not be deemed sufficient to warrant consideration by the Commission.

MCI believes that the salutary effects of competition render inappropriate a protestant raising the issue that the proposed service would duplicate existing service or that the protestant has sufficient capacity to meet current and future demand. MCI reasons that such protests do not voice a concern of the public at large but voice only a self-interested concern that protestant's opportunity to capture demand may be threatened by an efficient competitor. MCI suggests the following wording in lieu of the staff wording.

(3) If an existing utility protests such an application, the burden shall rest with the protestant to show that the application should not be granted. Only protests that raise specific issues which are material and significant to an applicant's provision of the proposed service and contain specific factual allegations (supported by affidavits or documentary evidence) will be valid and merit consideration by the Commission at the hearing. Protests based on a claim that the proposed service would duplicate existing services or based on the adequate capacity of the existing services will not be deemed sufficient to warrant consideration by the Commission.

Rocky, Fresno, Kidd's, and Autofone believe that the burden of proof should remain with the applicant.

Allied offered no objection to the change in the burden of proof which the staff proposed rule will bring about.

Comments on Commission Procedure
In Handling Applications

The staff recommends that the suggested new Rule 18(o) be accepted by the Commission as soon as possible. Then all applicants for paging services and all protestants should be allowed to modify their filings before the Commission to comply with the new rule. The Commission should then review the applications as expeditiously as the staff resources allow.

MCI recommends that where one or more valid protests are received that a hearing be held on the application within 45 days of the filing of the protests and that a decision be issued within 45 days after the hearing.

PAC believes that "protestants should be required to demonstrate the serious nature of their allegations by presenting, in the form of affidavits submitted with their protests, all of the evidence which they would present at a hearing." Applicants should then be entitled to argue that the protestant's evidence is inadequate to meet its burden of proof. PAC believes that the suggested procedure would enable the Commission to dismiss most protests and grant applications without the necessity of formal hearings. PAC also believes that even if a utility is entitled to be heard in opposition to the application of a potential competitor, "the Commission has a duty to qualify that right by requiring protestants to adhere to reasonable procedures designed to prevent abuse of the Commission's process." In addition, "if the Commission believes existing utilities are entitled to a hearing in all cases, the proposed requirement would considerably expedite application proceedings and would enable matters to be assigned promptly for hearing." For instance, where an applicant believes the affidavits of a protestant are insufficient the applicant may choose to stipulate to the affidavits, waive cross-examination on them, and have the matter decided on the pleadings.

In its written comments on the staff proposed modified Rule 18(o) MCI recommends that the Commission refuse to allow dominant

local telephone companies to offer paging and mobile radiotelephone service to the public contending that bottleneck control over the landline network and the potential for cross-subsidization would undermine competition,.but if local telephone companies are permitted to provide such service, they should be required to establish a separate subsidiary. MCI argues that [p]articipation in the RTU market by telephone companies with monopoly power over access to the landline system presents a grave threat to the development of meaningful competition.

PT&T filed a written motion to strike the portions of MCI's comments dealing with those MCI recommendations on the grounds mainly that such comments go beyond the scope of the OII, wireline telephone companies were not made respondents to the proceeding, and the Commission lacks authority to grant the relief sought by MCI. PT&T points out that "MCI itself has an even greater potential for cross-subsidization between its interexchange telephone service and its radiotelephone service." MCI responded to the motion by letter arguing that the issue it raised is critical to the question of regulating such service and that it must be addressed at some point because of the changes in the telecommunications industry. MCI requests that the motion be denied.

Discussion

It is evident the Commission's policy of limiting entry into the RTU field is not compatible with the FCC's open entry policy of granting relevant construction permits and that we must seek ways to reconcile the two policies. We believe that the staff proposed modified Rule 18(o), with certain amendments which we will indicate later should be made, will satisfactorily reconcile the policies and at the same time eliminate many of the cumbersome evidentiary roadblocks which would otherwise tax the Commission's resources and prevent the expedited handling of the expected flood of applications. We will use the staff proposed modified rule 18(o) as the primary basis for our discussion.

An application for an RTU certificate which does not show that the applicant has the relevant FCC permit(s) is incomplete and,

therefore, not ripe for processing.[9] This lack of completeness, which is found in twelve of the applications listed in the heading of this decision, is not satisfied by a showing that a corresponding FCC application is on file, which those 12 applications do show. The FCC applicant may amend its application to request a different channel, to correct technical errors, to conform to overlooked FCC in-house radiotelehone regulations, or to satisfy the objections of an adjacent RTU, any or all of which may affect the applicant's service area or other important service aspects. We have no way of taking official notice of what goes on within the FCC. There may be a mutually exclusive FCC application on file which could result in a denial of an FCC permit to an entity to which we have issued an RTU certificate. In a somewhat similar vein, the staff sampled the FCC applications filed for allocation of paging frequencies in the 900 MHz band[10] and found there are, so far, applications for 40 such frequencies to serve San Diego whereas only 37 such frequencies are available for that marketplace. We have no way of knowing which of those 40 applicants will not be given a permit. Nor do we have any way of knowing when the FCC will deny a permit because all the frequencies in some particular marketplace have been assigned. We will, therefore, adopt the staff proposal of limiting the filing of RTU applications before the Commission to those which contain a copy of the relevant FCC permit(s) to allow us to manage, in an orderly manner, the continuing regulation of RTUs.

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9 In the past the Commission was willing to accept and process such applications because the FCC in many instances used to require state certification before it would issue a permit and the number of RTU applications was small enough so that the problems they presented could be coped with. See Pomona Radio Dispatch, (1969) 70 CPUC 81 and (1976) 79 CPUC 497 where we extended the time to comply with our decision on 5 successive occasions over a period of 7 years because the FCC had not issued applicant a permit.

10 None of the FCC applicants for permits in the 900 MHz band have, so far, filed a concomitant application with us for an RTU certificate.

We see no compelling reason to set up a "regulatory lag plan" to assure completion of state certification prior to the expiration of the relevant FCC permits. We are well aware that an FCC permit has a construction expiration date--usually 8 months after date of issuance--as do our RTU certificates, and we feel that our new regulations adopted by this decision will permit us, with few exceptions, to close RTU application proceedings before the FCC permit expires. We should point out that PU Code § 4907 requires that an application for an RTU certificate must be filed within 30 days after the receipt of an FCC permit. This timely filing will assist us in expediting the processing of applications.

We do not think it necessary, as proposed by the staff in its modified Rule 18(o)(1), for an applicant to supply a map of the service areas of adjacent RTUs. Such responsibility should be placed on a protesting RTU who should include a map of its claimed service area with its protest. Furthermore, the service area of an adjacent RTU as plotted on a map by an applicant may differ somewhat from the service area claimed by the adjacent RTU. Such a difference may raise unnecessary issues and cause the adjacent RTUs to enter the proceeding simply to defend against the wrongful depiction of its service areas where it otherwise would have stayed out of the proceeding.

The staff proposed modified Rule 18(o)(2)(i-vi), which require certain information to be set out in an application for an RTU certificate, is reasonable. Most of the information requested is basic data which any prudent business person would first secure and consider before making a decision to initiate an RTU service in some particular area. An application which does not contain this information taints the proposed operation as being speculative. Some of the written comments argue that we should not require this information but rely on the sheer number of FCC paging applications and the economic self-interest behind them as proof that public convenience and necessity require the service of all applicants who

file with the Commission for RTU certificates. While there may be some substance to this argument--we are liberalizing our entry requirements--we do not think the argument carries much weight when considering the needs for service in any specific marketplace since our certification law is based on public need rather than on the pecuniary interest of an applicant. However, we will eliminate from the staff proposed modified Rule 18(o)(2)(v) the provision that an applicant, in addressing the economic feasibility of its proposed operation, must take into consideration the market share of other providers in the area. An applicant should be at liberty to choose its own method of showing economic feasibility with or without considering the market share of the other providers in the area.

Some of the written comments suggest that we set down as a rule the minimum number of written averments from prospective subscribers and others which will satisfy the public need showing required in the staff proposed modified Rule 18(o)(2)(i). We believe the decision as to how many written verified statements should be submitted with the application to satisfy such requirement should be left to the individual applicant or his representative. In many cases a few such statements will be able to establish a prima facie case of public need and in other cases more will be needed--it will depend on the quality of the contents of the written statements.

We are eliminating the requirement that an existing RTU which seeks to extend its service area into that of another RTU must show that the other RTU's service is unsatisfactory. We think that singling out by rule this particular evidence places too much emphasis on that element to the exclusion of other facts which may warrant the grant of an extension application.

We are also dropping the requirement that an RTU in an extension application case must first seek an interconnection agreement with an adjacent RTU into whose service area the applicant has applied to extend. As pointed out earlier an interconnection agreement covering paging service is not always workable. In mobile

radiotelephone operations in populated areas many such agreements would not be practical because the adjacent RTU's facilities cannot accommodate additional growth, while in sparsely settled areas additional growth may be accommodated in some cases. There are too many instances where interconnection agreements are either not workable or not practical to make it a general requirement that an attempt be made to reach such agreements in all cases.

Several of the written comments objected to an applicant being required to show the technical feasibility of the proposed operation. This should not be too difficult for an applicant to do. After all, the applicant proposes to engage in a technical calling and he should have knowledge of the technical feasibility of what he proposes. Furthermore, only a prima facie showing of technical feasibility will be necessary.

After an applicant, in its application, has shown that the proposed service will be responsive to a public demand or need, the staff proposed modified Rule 18(o)(3) provides that "the burden shall rest with the protestant to show that the application should not be granted." In the staff's written comments cited previously in this decision, the staff sets forth the key element which the protestant must affirmatively establish in order to maintain its protest, namely, that "granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service." The staff observes, and we agree, that this is a major change in policy from restricted entry to a policy of orderly growth. Just as important, however, is that the change will reconcile our policies and those of the FCC. In essence, the rule changes the relative importance of certain elements of proof to conform to the changing RTU environment. The rule downplays the Commission's role as the protector of the profits of a nonmonopolistic type of public utility and focuses instead on the overall effect that the granting of the application will have on the adequacy of existing service to the public in any particular

marketplace. The rule is also necessary to prevent over-zealous protestants from using Commission procedures to stalemate the FCC's program of greatly increasing the number of frequencies available for use by the public. The rule will also assist the Commission in expediting the processing of RTU applications. For example, as suggested by PAC, the applicant may choose to stipulate to entry of protestant's written averments and waive cross-examination, thereby allowing the proceeding to be concluded quickly. We believe, however, the rule should be amended to highlight the particular element of proof a protestant must affirmatively establish in order to maintain its protest, namely, that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service. In establishing this element of proof, the protestant should comply with Rules 8.1 through 8.8 of the Commission's Rules of Practice and Procedure.

American points out that some of the staff proposed modified rules are in conflict with previous sections of Rule 18. These conflicts have been worked out in our framing of the ultimate modified Rule 18(o) which we adopt in Appendix D. However, one such conflict needs discussing. American contends that requiring a telephone utility to estimate the number of customers and their requirements for the first and fifth years in the future, as required by Rule 18(j) should not apply to an RTU. American argues that while "this requirement may be useful for a wireline telephone utility that bases its projected customer list upon the number of homes and commercial enterprises in a given area where it is the only 'game in town', an RTU operates in a competitive environment and such an estimate is difficult to substantiate. We believe the manner of showing economic feasibility should be left up to the applicant and we will not apply Rule 18(j) to RTUs. This is not to say that economic feasibility, in part, cannot be shown by submitting a projection as described in Rule 18(j).

The question arises as to whether our newly adopted Rule 18(o) should apply to paging applications only and not to mobile two-way radiotelephone applications. Two of the applications listed in the heading of this decision request authority to operate mobile two-way radiotelephone service on mobile radiotelephone frequencies and also to operate paging service on one of the new paging frequencies. It would be difficult to bifurcate each of those applications and handle part of the applications under one procedure and part of the application under another procedure. It would also consume an inordinate amount of time. In addition, as we have previously pointed out, secondary paging service can be and is being given over frequencies used primarily to give mobile radiotelephone service. From a certification point of view we do not think there is sufficient difference between the two operations to warrant a set of rules for one operation and a different set of rules for the other operation as both operations constitute radiotelephone service. We will make our newly adopted Rule 18(o) apply to paging operations and to mobile two-way radiotelephone operations as well.

Most of the written comments either did not directly address the specific issues delineated by the OII for consideration (see Appendix A) or omitted comments on many such issues. A summary of our resolution of those issues is as follows:

We believe that delineated Issue A.1 should be answered in the affirmative. No reasons were advanced in the writen comments, and we see no reason why there should be two sets of entry requirements into the radiotelephone field. Our new Rule 18(o) applies to applications for both operations.

The first part of delineated Issue A.2. should also be answered in the affirmative. This matter has been previously discussed and we concluded that an FCC permit should be made a prerequisite to the filing of a certificate application with us. The second part of delineated Issue A.2. has also been discussed previously and we concluded that the answer should be in the negative as being unnecessary.

Delineated Issue A.3. asks whether the submission of "all necessary engineering data" is still appropriate or meaningful. The phrase "all necessary engineering data" is vague. We believe that submitting only the engineering data which was submitted to the FCC is necessary, and our new Rule 18(o)(1) so provides.

Because so few comments dealt with delineated Issue A.4. there is apparently no objection to the manner in which advice letter extensions are now handled.

Delineated Issue A.5. has been previously discussed and decided. The unsatisfactory service element has been eliminated in our new Rule 18(o) as a necessary element in proving applicant's case. We have also reduced the importance of the element of adequacy of existing service as a defense to an application by requiring protestant, in order to maintain its protest, to establish that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service.

Delineated Issue B.1. should be answered in the affirmative. However, the modification is minor. 47 CFR 22.504 is no longer keyed to all service areas but is now keyed to the service areas served by specific frequencies. Other parts of 47 CFR 22 are keyed to service areas served by other frequencies. We have included in new Rule 18(o) only that service area maps shall be prepared in accordance with "the applicable criteria set forth in 47 CFR 22."

Concerning the motion of PT&T to strike certain portions of MCI's written comments, we will deny PT&T's motion as the objected to comments are germane to the proceeding, even though wireline telephone companies were not made respondents to the proceeding. The Commission has had a long standing policy of fostering competition between RTUs and wireline telephone companies offering mobiletelephone service. (Malis, supra.) Merely because the FCC has increased its allocation of frequencies for RTU paging operations is no reason to change that policy to one forbidding wireline telephone companies from offering radiotelephone service in

competition with RTUs. "Dominant local telephone companies" and RTUs have been competing with each other for years without apparent injury to the RTUs. Furthermore, PU Code § 766 gives the Commission authority to settle disputes on most major points relative to the interconnection between RTUs and wireline telephone companies. We find little substance in the position of MCI on this issue or in its suggestion that a wireline telephone company be required to conduct its radiotelephone service through a corporate susidiary. The corporate subsidiary requirement would interfere with a wireline telephone company's present certificate rights to give radiotelephone service within its wireline telephone service area.

After conferring with the assigned Commissioner as required by Ordering Paragraph 5 of the OII and with the concurrence of the assigned Commissioner, the assigned Administrative Law Judge issued a ruling that there were no issues which need be addressed in public hearing, ruled that the OII be submitted as of June 6, 1983, and determined that the matter be handled on an ex parte basis. We affirm such ruling.

Findings of Fact

1. Presently there are approximately 51 RTUs certificated to operate in California.

2. The FCC previously allocated only 6 radio frequencies to RTUs for exclusive use in one-way paging operations.

3. Applicants seeking an FCC permit to use any of these 6 channels were required to show a public need as a prerequisite for obtaining an FCC permit.

4. The Commission in its RTU certificate proceedings has previously pursued a policy of limited entry.

5. Recently, the FCC opened up 69 additional channels for exclusive use in local one-way paging operations.

6. In granting initial one-way paging permits the FCC has adopted an open entry policy by eliminating its previous requirement of a showing of public need before granting permits.

7. To date, there are permit applications on file with the FCC which request, in the aggregate, authorization to establish over 350 one-way paging base stations in California.

8. If these FCC applications are granted there will be concomitant applications for certificates before this Commission to be processed in a very short time.

9. The Commission's current limited entry policy and the FCC's open entry policy are not compatible.

10. The Commission's limited entry policy will severely curtail the use of many radio frequencies which the FCC has made available for use by the public.

11. The Commission's limited entry policy will inordinately delay the processing of many RTU certificate applications which are now filed and expected to be filed.

12. By modifying Rule 18(o) and other parts of Rule 18 as set out in Appendix D Commission and FCC policies can be reconciled.

13. An application for an RTU certificate which does not show that the applicant has the relevant FCC permit(s) is incomplete and therefore should not be accepted for filing by the Commission.

14. No compelling reason has been put forward for the institution of a regulatory lag plan respecting the processing of RTU applications.

15. The information requested by new Rule 18(o)(1) in Appendix D is the basic data which any prudent business person would first secure and consider before making a decision to initiate an RTU service and should be easy to obtain and reduce to writing.

16. The method and form of the prima facie showing that the proposed service is responsive to public need and demand is best left to the applicant.

17. Singling out by rule that an applicant must prove that a competing RTU's service is unsatisfactory before an application will be granted places too much emphasis on that element to the exclusion of other facts which may warrant the grant of an extension application.

18. There are too many instances where interconnection agreements between RTUs are either not workable or not practical to make it a general requirement that an attempt to reach such agreement must be shown for an applicant to maintain its application.

19. Since an RTU applicant proposes to engage in a technical calling the application should show that its proposed operation is technically feasible.

20. Requiring a protestant, in order to maintain its protest, to prove that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service is a necessary and appropriate change to reconciling the Commission policies with those of the FCC.

21. Requiring a protestant to carry the burden as set out in the above finding will greatly reduce the possibility that the many new frequencies allocated by the FCC for use by the public in various marketplaces will lie idle and unused.

22. There are no significant differences between one-way paging and two-way mobile radiotelephone operations which would require a set of certification rules for the one operation and a different set of certification rules for the other operation.

23. Continued regulation of the RTU industry was found to be in the public interest in Decision 88513. There is no reason to modify this finding.

24. A public hearing on the OII is not necessary.

Conclusions of Law

1. Present Rule 18(o) should be deleted and in its place Rule 18(o) as set out in Appendix D should be adopted.

2. Rule 18(o) as set out in Appendix D is necessary and appropriate to reconcile the Commission's policies with those of the FCC respecting the authorization of RTU service.

3. Applicants and protestants presently involved in the applications listed in the heading of this decision should have 45 days from the date of this decision to amend their respective pleadings to conform to the rules set out in Appendix D.

4. Applications on file with this Commission which show that no relevant FCC permit(s) have been issued for the proposed operations should have until April 30, 1984 to obtain such permits. Once obtaining the permits applicant shall file a copy of it within 30 days of receipt. This will not cause delay since no operations under our certificate can begin until a federal certificate is obtained.

5. An application which does not contain the relevant FCC permit(s) is incomplete and in the future should not be accepted for filing.

6. PT&T's motion to strike part of MCI's written comments should be denied.

O R D E R

IT IS ORDERED that:

1. Present Rule 18(o) of the Commission's Rules of Practice and Procedure is canceled and in its place Rule 18(o) as set out in Appendix D is adopted.

2. Applicants and protestants presently involved in the applications listed in the heading of this decision have 45 days from the date of this decision to amend their respective pleadings to make the showings required by Rule 18(o) in Appendix D, after which time those applications and protests will, in due course, be considered on their merits, except as provided in Ordering Paragraph 3.

3. An application listed in the heading of this decision which, after 45 days from the date of this decision, does not contain a copy of the relevant Federal Communications Commission permit will not be further processed unless and until the time the application is amended to show a copy of such permit, provided that applicant shall have until April 30. 1984 within which to acquire such permit and amend its application. Upon obtaining the Federal Communications Commission permit, applicant shall file a copy of it with its application for amendment within 30 days of its receipt. In the event that neither of the time limits prescribed in this ordering paragraph are met, the application will be dismissed.

4. An application for a radiotelephone certificate which does not contain the relevant FCC permit(s) is incomplete and in the future will not be accepted for filing.

5. The Pacific Telephone and Telegraph Company's motion to strike part of MCI Airsignal of California's written comments is denied.

This order is effective today.

Dated AUG 17 1983, at San Francisco, California.

VICTOR CALVO
PRISCILLA C. CREW
DONALD VIAL
WILLIAM T. BAGLEY
Commissioners

Commissioner Leonard M. Grimes, Jr., being necessarily absent, did not participate.

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Joseph E. Bodovitz, Executive Director

APPENDIX A

Specific Issues Delineated in OII to be Considered

"A.1. Should the Commission clarify that the requisites of Rule 18(o) apply across-the-board (i.e., to all new entrants) rather than merely to existing RTU's?

"2. Is it appropriate to establish Rule 18(o) filing requirements for new entrants keyed to receipt of FCC construction permits, in order to avoid premature applications by those entities who do not have such construction permits? In this vein, is a form of 'regulatory lag plan' necessary, to assure completion of the state certification process prior to expiration of FCC construction permits, including all available extensions of same?

"3. Is the Rule 18(o)(1) requirement of submission of 'all necessary engineering data' still appropriate or meaningful?

"4. What constitutes sufficient notice to competitors of invocation of the 10% service area provision of Rule 18(o)(2)(iii)?

"5. Do changed circumstances require the Commission to alter the language of Rule 18(o)(2)(i) which now requires a showing 'that the present service is unsatisfactory', to provide broader standards for judging the adequacy of existing service in a particular service territory? If so, what standards of 'adequacy' should be adopted, given the size of a particular marketplace and assuming that the Commission's desire is to assure a reasonable degree of competition in the marketplace?

"B.1. Since the FCC's new paging allocations are not necessarily keyed to the service area criteria found in Section 22.504 of the Code of Federal Regulations, the Commission's service area definition, now exclusively tied to Section 22.504, will require some modification. What type of modification is appropriate?"

(END OF APPENDIX A)

APPENDIX B
Page 1

Present Rule 18(o)

(o) In the case of a radiotelephone utility proposing to expand its existing facilities, add new facilities or file to serve additional territory,

(1) When a radiotelephone utility applies to the FCC for a construction permit or change in its base station transmitters, antennae or frequencies, it shall at the same time submit all necessary engineering data to thiis Commission and obtain a staff letter of approval thereof. The effect of the proposed new or changed facilities on the utility's existing service area and that of adjacent RTUs will be shown on an engineered service area contour map.

(2) When the proposed expansion by the radiotelephone utility extends into the certified area of another radiotelephone utility and is contested by the latter, the applicant shall show:

(i) That the present service is unsatisfactory and the proposed operation will be technicaly and economically feasible, adequate and of good quality.

(ii) A statement that the radio-telephone utility attempted to reach an intercarrier agreement whereby traffic can be suitably interchanged to meet the public convenience and necessity. If agreement cannot be reached, both the applying radiotelephone utility and the complainant radio-telephone utility are hereby duly notified that this Commission, after hearing, may issue a mandatory intercarrier agreement or other suitable instrument pursuant to parts 766 and 767 of the Public Utilities Code as this Commission deems necessary to meet the public convenience and necessity.

(iii) Minor extensions of sevice area are excluded from these agreements where the overlap does not exceed 10% of either utility's service area and where the extension does not provide substantial coverage of additional major communities.

(END OF APPENDIX B)

Staff Proposed Modified Rule 18(o)

(o) In the case of an application to furnish one-way (paging) or two-way mobile radiotelephone service (other than cellular mobile radiotelephone service), the following requirements apply in addition to those enumerated in Rules 1 through 8, 15 through 17.1, and (a) through (j) above:

(1) When the applicant obtains the relevant construction permit from the FCC, it shall thereafter submit its application, including a legible copy of the engineering data submitted to the FCC, to this Commission. The proposed new service area, or the effect of changed facilities on the utility's existing service area, if any, and also the radio service areas of adjacent utilities furnishing mobile radiotelephone service will be shown on a fully legible engineered service area contour map, of suitable scale, prepared in accordance with the applicable creteria set forth in Part 22 of the FCC Rules and Regulations. in compliance with 18(c) above. The use of aeronautical charts for this purpose is unacceptable.

(2) Each such application shall address the following matters in a substantial manner and with particularity, consistent with the scope of the authorization sought: ✓

(i) Demonstration that the proposed service is responsive to public need and demand. ✓

(ii) Technical feasibility of the proposed system and the technical competence of the applicant.

(iii) Description of the proposed service including terms, conditions, area of coverage, quality, and features of service, and differences from presently provided service, if any, in the proposed service area.

(iv) Financial responsibility of the applicant.

(v) Economic feasibility of the proposed service in the market to be served, taking into consideration the market share of other providers in the area.

(vi) Present operations of the applicant.

(3) Should an existing utility protest such an application, the burden shall rest with the protestant to show that the application should not be granted. Protests of a general or nonspecific nature will not be deemed sufficient to warrant consideration by the Commission.

(4) Should an existing utility propose to provide service in an area contiguous to its authorized service area and not presently receiving radiotelephone service by any utility, an application for a certificate need not be made, but the engineering data required in (1) above shall be provided to the Commission.

(5) Should an existing utility propose an extension of service area which it believes to be minor in nature, it shall submit the relevant engineering data to the Commission with a written request for determination of the necessity for a certificate application. Reply will be by letter from an authorized representative of the Commission Communications Division. In general, an extension will be considered minor if it does not overlap the radio service area of another utility by more than 10% of either utility's radio service area and also does not provide substantial coverage of additional major communities.

(6) Actions as described in (4) or (5) above, or actions such as construction of fill-in transmitting facilities which do not affect service area boundaries, shall be described in tariff revisions which shall be promptly filed by the utility.

(END OF APPENDIX C)

New Rule 18(o)

(o) In the case of an application to furnish one-way paging or two-way mobile radiotelephone service (other than cellular mobile radiotelephone service), the following requirements apply in addition to those enumerated in Rules 1 through 8, 15 through 17.1, and (a), (b), (d), first sentence of (f), (g), (h), and (i) above:

(1) When the applicant obtains the relevant construction permit from the Federal Communications Commission (FCC) it shall, no later than 30 days after the grant of the relevant construction permit(s), submit its application, including a legible copy of the engineering data submitted to the FCC and a legible copy of its FCC permit(s), to this Commission. The proposed new service area, or the effect of changed facilities on the utilty(s) existing service area, if any, will be shown on a fully legible engineered service area contour map, of suitable scale, prepared in accordance with the applicable criteria set forth in 47 CFR 22. The use of aeronautical charts for this purpose is unacceptable.

(2) Each application shall address the following matters in a substantial manner and with particularity, consistent with the scope of the authorization sought:

(i) Demonstration that the proposed service is responsive to public need and demand.

(ii) Technical feasibility of the proposed system and the technical competence of the applicant.

(iii) Description of the proposed service including terms, conditions, area of coverage, quality, and features of service, and differences from any service presently provided in the proposed service area.

(iv) Financial responsibility of the applicant.

(v) Economic feasibility of the proposed service in the market to be served.

(vi) Present operations of the applicant and affiliated companies.

(3) Should an existing utility protest such application, the burden shall rest with the protestant to show that the application should not be granted by affirmatively establishing that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service. The protest shall conform to Rules 8.1 through 8.8 of the Commission's Rules of Practice and Procedure. A service map of protestant's claimed service area shall be filed with the protest. Protests of a general or nonspecific nature will not be sufficient to warrant consideration by the Commission.

(4) Should an existing utility propose to provide service in an area contiguous to its authorized service area and not presently receiving radiotelephone service by any utility, an application for a certificate need not be made, but the engineering data required in (1) above shall be provided to the Commission staff.

(5) Should an existing utility propose an extension of service area which it believes to be minor in nature, but to which (4) above is inapplicable, it shall submit the relevant engineering data to the Commission staff, with a written request for determination of the necessity for a certificate application. Reply will be by letter from an authorized representative of the Commission's Communications Division. In general, an extension will be considered minor if it does not overlap the radio service area of another utility by more than 10% of either utility's

radio service area and also does not provide substantial coverage of additional major communities.

(6) Actions as described in (4) or (5) above, or actions such as construction of fill-in transmitting facilities which do not affect service area boundaries, shall be described in tariff revisions which shall be promptly filed by the utility.

(END OF APPENDIX D)

4. Applications on file with this Commission which show that no relevant FCC permit(s) have been issued for the proposed operations should have until April 30, 1984 to obtain such permits. Once obtaining the permits applicant shall file a copy of it within 30 days of receipt. This will not cause delay since no operations under our certificate can begin until a federal certificate is obtained.

5. An application which does not contain the relevant FCC permit(s) is incomplete and in the future should not be accepted for filing.

6. PT&T's motion to strike part of MCI's written comments should be denied.

O R D E R

IT IS ORDERED that:

1. Present Rule 18(o) of the Commission's Rules of Practice and Procedure is canceled and in its place Rule 18(o) as set out in Appendix D is adopted.

2. Applicants and protestants presently involved in the applications listed in the heading of this decision have 45 days from the date of this decision to amend their respective pleadings to make the showings required by Rule 18(o) in Appendix D, after which time those applications and protests will, in due course, be considered on their merits, except as provided in Ordering Paragraph 3.

3. An application listed in the heading of this decision which, after 45 days from the date of this decision, does not contain a copy of the relevant Federal Communications Commission permit will not be further processed unless and until the time the application is amended to show a copy of such permit, provided that applicant shall have until April 30, 1984 within which to acquire such permit and amend its application. Upon obtaining the Federal Communications Commission permit, applicant shall file a copy of it within 30 days of its receipt. In the event that neither of the time limits prescribed in this ordering paragraph are met, the application will be dismissed.

frequency agility, i.e., pagers are preset to receive only a single channel. In addition, in assigning paging channels to separately-owned RTUs, the FCC will not assign the same frequency to contiguous RTUs because of interference and other problems. On the other hand, the interchange of traffic between two separately-owned RTUs operating mobile radiotelephone service over disparte frequencies in contiguous or close-by areas is workable because the mobile units have frequency agility, i.e., are capable of operating on a range of channels.

Commission Policy Re Proof of Need for Service

RTUs are subject to the same general statutory certification requirements applicable to wireline telephone companies. (PU Code § 1001). Upon application for an RTU certificate the Commission "may...issue the certificate as prayed for...as in its judgment the public convenience and necessity may require; provided, however, upon timely application for a hearing any person entitled to be heard thereat, the Commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon". (PU Code § 1005(a)). In practice, the Commission has declined to adopt a policy of awarding exclusive franchises to RTUs, but instead has pursued a policy of limited entry while at the same time encouraging the development of limited competition both among existing RTUs and between RTUs and wireline telephone companies who offer radiotelephone service.

Rule 18 sets forth the data which must be contained in an application for an RTU certificate. Rule 18(e) requires any applicant for an RTU certificate to furnish in its application (and hence prove) facts which show that public convenience and necessity require the proposed activity applied for.

But, according to present Rule 18(o), if the applicant is an existing RTU which seeks to expand its present service area into the service area of another RTU and the other RTU protests the

Staff Proposed Modification

(2)(iv) Financial responsibility of the applicant.

The only comment with respect to this proposed modification is that an applicant should be permitted to prove its responsibility through submission of its financial statement, its estimated cost of construction, and that it has the financial ability to meet those estimated costs of construction.

Staff Proposed Modification

(2)(v) Economic feasibility of the proposed service in the market to be served, taking into consideration the market share of other providers in the area.

American believes this requirement "is a throwback to the days of public convenience and necessity and is therefore inappropriate and unnecessary" in view of the very large potential market for paging service in the country.

Cal Autofone believes that "Assurance should be made that the new applicant will indeed serve the public interest, i.e., offer new services, new rates, new service area and, in addition, will not harm the public interest by causing detriment to the existing carriers."

ICS believes that since the staff proposed rule dealing with market share prescribes no specific guidelines it deals in generalities or intangibles and can only perpetuate regulatory lagg and regulatory inconsistency.

MCI considers the threshold showing of "economic feasibility" as required by the staff rule to be extremely costly and burdensome on the applicant. The requirements of such a showing would "perpetuate extensive regulation in the precise areas where the marketplace will endure self-regulation" and should not be included in the rule.

marketplace. The rule is also necessary to prevent over-zealous protestants from using Commission procedures to stalemate the FCC's program of greatly increasing the number of frequencies available for use by the public. The rule will also assist the Commission in expediting the processing of RTU applications. For example, as suggested by PAC, the applicant may choose to stipulate to entry of protestant's written averments and waive cross-examination, thereby allowing the proceeding to be concluded quickly. We believe, however, the rule should be amended to highlight the particular element of proof a protestant must affirmatively establish in order to maintain its protest, namely, that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service. In establishing this element of proof, the protestant should comply with Rules 8.1 through 8.8 of the Commission's Rules of Practice and Procedure.

American points out that some of the staff proposed modified rules are in conflict with previous sections of Rule 18. These conflicts have been worked out in our framing of the ultimate modified Rule 18(o) which we adopt in Appendix D. However, one such conflict needs discussing. American contends that requiring a telephone utility to estimate the number of customers and their requirements for the first and fifth years in the future, as required by Rule 18(j) should not apply to an RTU. American argues that while "this requirement may be useful for a wireline telephone utility that bases its projected customer list upon the number of homes and commercial enterprises in a given area where it is the only 'game in town', an RTU operates in a competitive environment and such an estimate is difficult to substantiate. We believe the manner of showing economic feasibility should be left up to the applicant and we will not apply Rule 18(j) to RTUs. This is not to say that economic feasibility, in part, cannot be shown by submitting a projection as described in Rule 18(j).

The question arises as to whether our newly adopted Rule 18(o) should apply to paging applications only and not to mobile two-way radiotelephone applications. Two of the applications listed in the heading of this decision request authority to operate mobile two-way radiotelephone service on mobile radiotelephone frequencies and also to operate paging service on one of the new paging frequencies. It would be difficult to bifurcate each of those applications and handle part of the applications under one procedure and part of the application under another procedure. It would also consume an inordinate amount of time. In addition, as we have previously pointed out, secondary paging service can be and is being given over frequencies used primarily to give mobile radiotelephone service. From a certification point of view we do not think there is sufficient difference between the two operations to warrant a set of rules for one operation and a different set of rules for the other operation as both operations constitute radiotelephone service. We will make Rule 18(o) apply to paging operations and to mobile two-way radiotelephone operations as well.

Most of the written comments either did not directly address the specific issues delineated by the OII for consideration (see Appendix A) or omitted comments on many such issues. A summary of our resolution of those issues is as follows:

We believe that delineated Issue A.1 should be answered in the affirmative. No reasons were advanced in the writen comments, and we see no reason why there should be two sets of entry requirements into the radiotelephone field. Our new Rule 18(o) applies to applications for both operations.

The first part of delineated Issue A.2. should also be answered in the affirmative. This matter has been previously discussed and we concluded that an FCC permit should be made a prerequisite to the filing of a certificate application with us. The second part of delineated Issue A.2. has also been discussed previously and we concluded that the answer should be in the negative as being unnecessary.

18. There are too many instances where interconnection agreements between RTUs are either not workable or not practical to make it a general requirement that an attempt to reach such agreement must be shown for an applicant to maintain its application.

19. Since an RTU applicant proposes to engage in a technical calling the application should show that its proposed operation is technically feasible.

20. Requiring a protestant, in order to maintain its protest, to prove that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service is a necessary and appropriate change to reconciling the Commission policies with those of the FCC.

21. Requiring a protestant to carry the burden as set out in the above finding will greatly reduce the possibility that the many new frequencies allocated by the FCC for use by the public in various marketplaces will lie idle and unused.

22. There are no significant differances between one-way paging and two-way mobile radiotelephone operations which would require a set of certification rules for the one operation and a different set of certification rules for the other operation.

23. Continued regulation of the RTU industry was found to be in the public interest in Decision 88513. There is no reason to modify this finding.

24. A public hearing on the OII is not necessary.

Conclusions of Law

1. Present Rule 18(o) should be deleted and in its place Rule 18(o) as set out in Appendix D should be adopted.

2. Rule 18(o) as set out in Appendix D is necessary and appropriate to reconcile the Commission's policies with those of the FCC respecting the authorization of RTU service.

3. Applicants and protestants presently involved in the applications listed in the heading of this decision should have 45 days from the date of this decision to amend their respective pleadings to conform to the rules set out in Appendix D.

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4. Applications on file with this Commission which show that no relevant FCC permit(s) have been issued for the proposed operations should have until April 30, 1984 to obtain such permits. Once obtaining the permits applicant shall file a copy of it within 30 days of receipt. This will not cause delay since no operations under our certificate can begin until a federal certificate is obtained.

5. An application which does not contain the relevant FCC permit(s) is incomplete and in the future should not be accepted for filing.

6. PT&T's motion to strike part of MCI's written comments should be denied.

O R D E R

IT IS ORDERED that:

1. Present Rule 18(o) of the Commission's Rules of Practice and Procedure is canceled and in its place Rule 18(o) as set out in Appendix D is adopted.

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APPENDIX B
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Present Rule 18(o)

(o) In the case of a radiotelephone utility proposing to expand its existing facilities, add new facilities or file to serve additional territory,

(1) When a radiotelephone utility applies to the FCC for a construction permit or change in its base station transmitters, antennae or frequencies, it shall at the same time submit all necessary engineering data to thiis Commission and obtain a staff letter of approval thereof. The effect of the proposed new or changed facilities on the utility's existing service area and that of adjacent RTUs will be shown on an engineered service area contour map.

(2) When the proposed expansion by the radiotelephone utility extends into the certified area of another radiotelephone utility and is contested by the latter, the applicant shall show:

(i) That the present service is unsatisfactory and the proposed operation will be technicaly and economically feasible, adequate and of good quality.

(ii) A statement that the radio-telephone utility attempted to reach an intercarrier agreement whereby traffic can be suitably interchanged to meet the public convenience and necessity. If agreement cannot be reached, both the applying radiotelephone utility and the complainant radio-telephone utility are hereby duly notified that this Commission, after hearing, may issue a mandatory intercarrier agreement or other suitable instrument pursuant to parts 766 and 767 of the Public Utilities Code as this Commission deems necessary to meet the public convenience and necessity.

Staff Proposed Modified Rule 18(o)

(o) In the case of an application to furnish one-way (paging) or two-way mobile radiotelephone service (other than cellular mobile radiotelephone service), the following requirements apply in addition to those enumerated in Rules 1 through 8, 15 through 17.1, and (a) through (j) above:

(1) When the applicant obtains the relevant construction permit from the FCC, it shall thereafter submit its application, including a legible copy of the engineering data submitted to the FCC, to this Commission. The proposed new service area, or the effect of changed facilities on the utility's existing service area, if any, and also the radio service areas of adjacent utilities furnishing mobile radiotelephone service will be shown on a fully legible engineered service area contour map, of suitable scale, prepared in accordance with the applicable creteria set forth in Part 22 of the FCC Rules and Regulations, in compliance with 18(c) above. The use of aeronautical charts for this purpose is unacceptable.

(2) Each such application shall address the following matters in a substantial manner and with particularity, consistent with the scope of the authorization sought:

(i) Demonstration that the proposed service is responsive to public need and demand.

(ii) Technical feasibility of the proposed system and the technical competence of the applicant.

(iii) Description of the proposed service including terms, conditions, area of coverage, quality, and features of service, and differences from presently provided service, if any, in the proposed service area.

(iv) Financial responsibility of the applicant.

(iv) Financial responsibility of the applicant.

(v) Economic feasibility of the proposed service in the market to be served.

(vi) Present operations of the applicant and affiliated companies.

(3) Should an existing utility protest such application, the burden shall rest with the protestant to show that the application should not be granted by affirmatively establishing that granting the application will so damage existing service or the particular marketplace as to deprive the public of adequate service. The protest shall conform to Rules 8.1 through 8.8 of the Commission's Rules of Practice and Procedure. A service map of protestant's claimed service area shall be filed with the protest. Protests of a general or nonspecific nature will not be sufficient to warrant consideration by the Commission.

(4) Should an existing utility propose to provide service in an area contiguous to its authorized service area and not presently receiving radiotelephone service by any utility, an application for a certificate need not be made, but the engineering data required in (1) above shall be provided to the Commission staff.

(5) Should an existing utility propose an extension of service area which it believes to be minor in nature, but to which (4) above is inapplicable, it shall submit the relevant engineering data to the Commission, with a written request for determination of the necessity for a certificate application. Reply will be by letter from an authorized representative of the Commission's Communications Division. In general, an extension will be considered minor if it does not overlap the radio service area of another utility by more than 10% of either utility's