

ORIGINAL

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

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FILE

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ET Docket No. 92-9

APR 15 1992

Federal Communications Commission
Office of the Secretary

_____)
In the Matter of)
Redevelopment of Spectrum to)
Encourage Innovation in the)
Use of New Telecommunications)
Technologies)
_____)

OPPOSITION TO PETITION FOR CLARIFICATION

Personal Communications Network Services of New York, Inc., a LOCATE company ("PCNS-NY"), by its undersigned counsel, hereby submits these comments in response to the petition for clarification filed by the Association of American Railroads ("AAR").

I. Introduction

PCNS-NY is a small business, entrepreneurial company that has applied for a pioneer's preference to provide personal communications services ("PCS") in the New York City metropolitan area. As part of its pioneering work to introduce PCS in the United States, PCNS-NY has been actively negotiating with existing 1850-1990 MHz users in the New York City metropolitan area to relocate these users to higher frequencies and provide spectrum for PCS. Although it does not yet have a PCS license, PCNS-NY has chosen to commit its resources to reaching private agreements for the relocation of these existing users to other frequencies or alternative media. PCNS-NY's novel approach addresses the needs of existing users for reliable and improved

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communications facilities at no cost to the existing user and provides adequate spectrum for PCS. The Commission's policy to grant applications filed for new facilities in the 1850-1990 Mhz band after January 16, 1992 on a secondary basis only is critical to the viability of a market-based relocation plans such as those of PCNS-NY.

PCNS-NY's opposes AAR's petition on the grounds that: (1) the Commission's Notice of Proposed Rulemaking ("Notice")^{1/} is unambiguous and clearly sets forth the Commission's decision to grant new microwave applications for frequencies in the designated bands filed after the date of adoption of the Notice on a secondary basis only; (2) the Commission's policy of approving applications filed after adoption of the Notice is an interim procedural rule that is not subject to the notice and comments provisions of the Administrative Procedure Act; and (3) the Commission's treatment of new applications filed after January 16, 1992 will achieve the Commission's goal of developing a transition plan that will accommodate the needs of existing users and make spectrum available for emerging technologies. Accordingly, PCNS-NY respectfully requests that AAR's Petition for Clarification be denied.

^{1/} In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Notice of Proposed Rulemaking, ET Docket No. 92-9 (Adopted Jan. 16, 1992, Rel. Feb. 7, 1992).

II. The Commission's Notice of Proposed Rulemaking Is Not Ambiguous and Does Not Require Clarification

In its Notice, the Commission outlines a transition plan that will facilitate the relocation of existing users in the frequency bands identified by the Commission and permit allocation of these frequencies to emerging technologies. The transition plan consists of three separate elements the first of which became effective upon adoption of the Notice. This element provides that the Commission will only grant applications for new fixed microwave facilities in the bands identified by the Commission in the Notice filed after the date of adoption of the Notice on a secondary basis. Despite the clear language used by the FCC, AAR contends that this rule requires clarification.

A reading of the Notice demonstrates that clarification is unnecessary. In the Notice the Commission clearly and unambiguously states that:

applications for new facilities submitted after the adoption date of this Notice will be granted on a secondary basis only, conditioned upon the outcome of this proceeding.^{2/}

Contrary to the AAR's tortured reading of the language in paragraph twenty-three, the language used by the Commission does not support an interpretation that the Commission, for this element of the transition plan, was attempting to set forth a

^{2/} See Notice at ¶ 23.

"future transition plan."^{3/} Rather, the appropriate and only supportable reading of this paragraph of the Notice is that the Commission changed its procedural rules for approving new applications for new facilities in this band upon adoption of the Notice and subject to the outcome of the proceeding.

The language used by the Commission to describe the two other elements of the transition plan demonstrates the Commission's clear intent that the new application processing rule become effective upon adoption of the Notice. In describing the second element of the transition plan, the establishment of a fixed time frame for continued co-primary use of the band, the Commission stated:

"we propose to allow currently licensed 2 GHz fixed licensees to continue to occupy 2 GHz frequencies on a co-primary basis with new service for a fixed period of time, for example ten or fifteen years."^{4/}

Similarly, in describing the third element of the transition plan, the use of market-based negotiations between new spectrum users and existing users to accomplish relocation, the Commission stated:

"We propose to allow providers of new services assigned spectrum allocated to the new emerging technologies bands to negotiate financial arrangements with existing licensees."^{5/}

^{3/} See AAR Petition at 2.

^{4/} See Notice at ¶ 24 (emphasis added).

^{5/} See Notice at ¶ 26 (emphasis added).

Significantly, paragraph twenty three does not "propose" to grant applications on a secondary basis; paragraph twenty three clearly provides that if filed after the adoption date of the Notice, applications "will" be granted on a secondary basis only. The text of the Notice itself, thus, reveals that the Commission made an intentional and unambiguous distinction between the immediate applicability of the Commission's application processing rule and the second two elements of the transition plan.

AAR's second plausible interpretation of paragraph twenty three therefore is correct. The application processing rule became effective upon adoption of the Notice. The Commission has merely requested comment on the appropriateness of the "cut-off" date as set forth in footnote nineteen of the Notice. Furthermore, the Commission's decision to make the procedural rule effective upon adoption of the Notice does not amount to a retroactive change to the Commission's rules. To the contrary, the rule only applies to new applications filed after the date of adoption of the notice and is therefore prospective in its application rather than retroactive.

III. The Commission's Decision to Approve Applications on a Secondary Basis is a Procedural Rule That is Not Subject to Notice and Comment Pursuant to the Administrative Procedure Act.

The Commission's decision to approve applications for new fixed facilities filed after the date of adoption of the Notice

on a secondary basis is a procedural rule that is not subject to the notice and comment requirements of the Administrative Procedure Act. Accordingly, AAR's request that the Commission treat its petition as a request for reconsideration and claim that adoption of the rule violates the Administrative Procedure Act must be denied.^{6/}

Under the Administrative Procedure Act, procedural rules are not subject to public notice or comment.^{7/} The FCC has previously adopted similar application processing rules during the pendency of a rulemaking proceeding without notice or comment including the imposition of application "freezes." The policies have been held by the courts to be procedural rules that are not subject to the notice and Comment requirements of the Administrative Procedure Act. In Neighborhood TV Company, Inc. v. FCC, 742 F.2d 629 (D.C. Cir. 1984), the United States Court of Appeals for the District of Columbia found that the FCC's decision to freeze applications for opposed translator stations was a procedural rule that was not subject to the notice and comment provisions of the Administrative Procedure Act. Similarly, in Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963), the same court upheld the FCC's order freezing the acceptance of applications for radio broadcast stations pending the adoption of new rules and found that the freeze was a procedural rule that

^{6/} See AAR Petition at n.3

^{7/} See 5 U.S.C.A. § 553(b) (1977).

are not subject to notice and comment under the Administrative Procedure Act.

In this proceeding, the Commission has chosen to adopt a procedural rule for processing applications during the pendency of this rulemaking: "new facilities submitted after the adoption date of this Notice will be granted on a secondary basis only, conditioned upon the outcome of this proceeding." ^{2/} Unlike prior interim procedures adopted in other rulemaking proceedings that have been upheld by the court, the Commission has not chosen to "freeze" the processing of applications for the 2 GHz bands identified in the Notice but rather has chosen to take a more moderate approach and elected to continue to process and approve applications on a secondary basis subject to the outcome of this rulemaking. Accordingly, the Commission's decision to process applications filed after the adoption of the Notice is a procedural rule that is not subject to notice and comment under the Administrative Procedure Act.^{2/}

IV. The Commission's Policy on Applications Filed After the Adoption of the Notice Will Meet the Policy Goals Articulated in the Notice

^{2/} See Notice at ¶ 23.

^{2/} Furthermore, AAR may file comments in the rulemaking that address the first element of the transition plan. The ability to file comments on this issue, however, does not invalidate or alter the effective date of the Commission's policy for only granting applications filed after January 16, 1992 on a secondary basis.

As set forth in the Notice and recited in AAR's petition, the three part transition plan described by Commission in the Notice, is designed to reaccommodate licensees in the manner: (A) most advantageous to existing users; (B) least disruptive to the public; and (C) conducive to the introduction of new services. The Commission's application processing rule will fulfill these three goals.

A. The Commission's Decision to Prospectively Grant new Applications on a Secondary Basis is in the Best Interest of Existing Users.

By choosing to apply the secondary only policy on a prospective basis (to applications filed after the date of the Notice), the Commission has protected existing facilities in the 2 GHz band and provided existing and future users with an incentive to select frequencies other than those identified by the Commission for reallocation for expanded and new operations.^{10/} By providing this advance notice, existing users will be able to make informed investment decisions to purchase equipment operating on higher frequencies that will provide protected, i.e. primary, communications capabilities for an extended period of time.

^{10/} The rule applies to applications for new facilities. Accordingly, to the extent a modification to an existing facility constitutes a "new facility" and the application is filed after January 16, 1992, the application should only be approved on a secondary basis.

AAR contends that the Commission's policy of prospectively approving applications for new facilities in the designated bands will have an "adverse impact of substantial proportions on the railroad industry and other users of private microwave systems."^{11/} Significantly, AAR has not presented any evidence to substantiate its claim. Without such a showing the Commission has no basis to evaluate AAR's claim and the policy for processing new applications must be maintained.

B. The Commission's Application Processing Rule Will Not Disrupt Communications

Until spectrum from the emerging technologies band is allocated to a new service, facilities licensed on a secondary basis will effectively be able to operate in the band on a primary basis. Procedurally, this rulemaking is only the first of two stages in an allocation of spectrum to a particular service. Once the emerging technologies band is established the Commission must make a second decision to allocate spectrum from the band to a particular service. Depending on the service to which spectrum is allocated and the service areas where service is provided, new facilities licensed on a secondary basis, in fact, may continue to operate in the band exclusively. Accordingly, in some areas the need to relocate to higher

^{11/} See AAR Petition at 3.

frequencies will be delayed perhaps indefinitely forestalling any potential disruption in service.

In addition, the selection of frequencies, other than those in the 2 GHz band, by users who seek to operate new facilities will prevent a disruption of service by preempting the later need to relocate these facilities to higher frequencies.

C. Approval of Applications on a Secondary Basis is Conducive to the Introduction of New Services.

The application processing rule adopted by the Commission will be conducive to the introduction of new services and minimize the need for relocation. As stated in the Notice, the Commission's application processing rule is designed to achieve the dual goals of preserving vacant spectrum and discouraging speculative application:

"we wish to ensure the availability of existing vacant 2 GHz spectrum for the initial development of new services and to discourage possible speculative fixed service applications for this spectrum."^{12/}

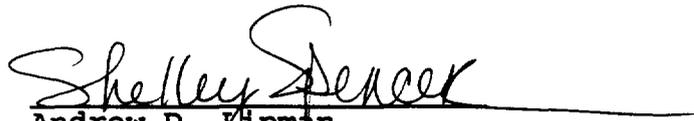
Through these dual goals, the Commission will limit the additional users and facilities in the band that ultimately will have to be reaccommodated to higher frequencies and foster the introduction of new services such as PCS.

^{12/} See Notice at ¶ 23.

IV. CONCLUSION

AAR seeks clarification of a procedural rule that is unambiguous and was adopted by the Commission in accordance with the Administrative Procedure Act. The rule effectively balances the needs of existing users in the 2 GHz band, the public, and the dire need for spectrum for emerging technologies. Accordingly, PCNS-NY submits that AAR's petition should be denied.

Respectfully submitted,


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Date: April 15, 1992

CERTIFICATE OF SERVICE

I, Jeannine Allen, a secretary with the law firm of Swidler & Berlin, Chartered, do hereby certify that a true and correct copy of the foregoing **Opposition to Petition for Clarification** was mailed first-class mail, postage prepaid, this 15th day of April, 1992, to the following:

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