

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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DEC 21 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re)
)
SunCom Mobile & Data, Inc.)
) GN Docket No. 93-252
Implementation of Sections 3(n))
and 332 of the Communications Act)
)
To: The Commission

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION

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December 21, 1994

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ATTACHMENTS

Attachment A: Letter of Richard J. Shiben to Robyn G. Nietert, dated May 17, 1990, in re Millicom

Attachment B: Letter of Terry L. Fishel to Gerald S. McGowan, dated March 17, 1993, in re Dial Page

Attachment C: Letter of Michael J. Regiec to Raymond A. Kowalski, dated August 31, 1994, in re DCL Associates, Inc.

SUMMARY

By companion filings submitted very early in 1994, SunCom requested (a) a declaratory ruling that its acquisition of ownership of multiple 220 MHz systems after they had been constructed in a given geographic area would not contravene Section 90.739 of the rules and (b) a waiver of Section 90.725(f) of the rules to afford adequate time for construction of its network.

The Commission decided that SunCom's Declaratory Ruling Request presented a question worthy of formal consideration and incorporated the request into this notice and comment docket. After compiling a substantial record on the request, however, the FCC failed to address the specific question that SunCom posed. While the Commission has discretion initially to entertain a request for declaratory ruling, once it invited comments on the request, it assumed an obligation to assure that its consideration of the request complied with applicable procedural requirements. But since the SunCom request was denied, based solely upon the erroneous belief that SunCom proposed pre-construction, rather than post-construction channel aggregation, the Commission failed to provide proper consideration to the request.

SunCom's Waiver Request for an extended construction schedule was tailored to comply with clearly-articulated Commission pronouncements governing extensions of construction schedules. Yet the Commission denied the request after providing only a perfunctory, two-sentence discussion of it. Such treatment contravenes prior Commission pronouncements governing the treatment

of such requests. It also violates the Melody Music doctrine prohibiting disparate treatment when precedent is inexplicably ignored. Finally, the Commission's treatment of the waiver request violated longstanding WAIT Radio criteria, in that it "crossed the line from the tolerably terse to the intolerably mute."

For all the foregoing reasons, SunCom requests that the Commission (a) issue a declaratory ruling that SunCom's post-construction acquisition plan is permitted under Section 90.739; (b) waive Section 90.725(f) to afford SunCom adequate time to place the network into operation; and in any event (c) provide a reasoned explanation for its decision on reconsideration.

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To: The Commission

PETITION FOR RECONSIDERATION

SunCom Mobile & Data, Inc. ("SunCom"), by its attorney, and pursuant to Section 405(a) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 405(a), and Section 1.429(a) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.429(a), hereby petitions the Commission to reconsider its actions denying SunCom's requests for a declaratory ruling^{1/} and a rule waiver.^{2/} See Third Report and Order in GN Docket No. 93-252, 59 Fed. Reg. 59945 (Nov. 21, 1994), FCC 94-212, at para. 129, (rel. Sept. 23, 1994).^{3/} In support thereof, the following is respectfully submitted:

I. Background

1. By companion filings made on January 28 and February 1, 1994, SunCom sought two specific rulings on issues critical to the

^{1/} See Letter of Thomas Gutierrez to Ronald F. Netro (Feb. 1, 1994) ("Declaratory Ruling Request").

^{2/} See SunCom, Request for Rule Waiver (Feb. 1, 1994) ("Waiver Request").

^{3/} Under separate cover, as a request for alternative relief, SunCom is simultaneously submitting a Petition to Sever SunCom's Waiver Request and Declaratory Ruling Request from this proceeding. The basis for that request is that both the Waiver Request and Declaratory Ruling Request involve factual matters peculiar to SunCom's particular proposed system. As such, they can be more properly handled in the context of an adjudicatory proceeding.

implementation of its proposed multi-market, 220-222 MHz network. SunCom requested a declaratory ruling that its acquisition of ownership of multiple 220 MHz systems constructed in a given geographic area would not contravene Section 90.739 of the Rules, 47 C.F.R. § 90.739. See Declaratory Ruling Request, at 2. SunCom also requested a waiver of Section 90.725(f) of the Rules, 47 C.F.R. § 90.725(f), to afford adequate time for construction of its network. See Waiver Request, at 9-11.

2. SunCom sought declaratory relief to remove uncertainty regarding compliance with the 40-mile limit of Section 90.739 when multiple licenses for constructed systems were acquired in the same geographic area. While such acquisitions are clearly permitted,^{4/} and SunCom is confident that its particular "communications requirements" comply with the spirit of Section 90.739, SunCom sought a declaratory ruling to allay concerns stemming from the lack of specificity in that rule.

3. The Commission decided that SunCom's Declaratory Ruling Request presented a question worthy of formal consideration. The Commission "incorporated" the request into this docket, and it solicited public comments on the merits of the Declaratory Ruling Request. See Further Notice of Proposed Rulemaking in GN Docket No. 93-252, 9 FCC Rcd 2863, 2872 (1994). Comments were invited specifically on the question of whether allowing "regional

^{4/} See 47 C.F.R. §§ 90.153, 90.709(a). See also Report and Order in PR Docket No. 89-552, 6 FCC Rcd 2356, 2367 (1991) ("220 MHz Order").

licensing" of 220 MHz systems would promote regulatory symmetry in the mobile services marketplace. See id.

4. The Commission also noted SunCom's request for a rule waiver. See id. at 2872 n.61. However, it did not invite public comment on that request. Nevertheless, comments were filed on the issues raised by SunCom's Waiver Request, as well as its Declaratory Ruling Request.^{5/}

5. When it acted in this rulemaking, the Commission explicitly denied both matters brought by SunCom. Third Report, at para. 129. However, after compiling a substantial record on SunCom's Declaratory Ruling Request, the FCC failed to address the specific question that SunCom posed -- whether channels could be aggregated after licensees had constructed their 220 MHz facilities. See Declaratory Ruling Request, at 2; Reply Comments, at 2 n.4. The Commission agreed with SunCom that there is a "potential benefit in allowing local 200 MHz licensees to aggregate more than five channels in a given market," but it denied the Declaratory Ruling Request "[b]ecause Suncom seeks to aggregate channels assigned to licensees who have not yet completed construction."^{6/} Third

^{5/} By SunCom's count, nine other parties submitted comments on the need for extended construction schedules generally, and seven of these parties addressed SunCom's proposals directly. See Reply Comments of SunCom Mobile & Data, Inc., GN Docket No. 93-252, at 3 & n.6 (July 11, 1994).

^{6/} Thus, the Commission's reference to the "heavy burden of proof" that exists for applicants seeking aggregate channels prior to construction (see Third Report, at para 129) is clearly misplaced. Any suggestion that the SunCom Declaratory Ruling Request should have been subjected to a "heavy burden of proof" (continued...)

Report, at para. 129. The Commission also denied the SunCom Waiver Request but provided no basis for its denial.

II. Argument

A. The Commission Failed To Decide The Question Presented By SunCom's Declaratory Ruling Request

6. The Commission's decision whether to entertain any request for declaratory relief is discretionary.^{7/} Obviously, therefore, the Commission did not have to issue a declaratory ruling merely because SunCom requested one. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 602 (D.C. Cir. 1973). However, once it publicly announced that it would entertain comments on SunCom's request for declaratory relief, see Further Notice, 9 FCC Rcd at 2872, the Commission assumed the obligation to assure that its consideration

^{6/} (...continued)

is belied on at least three bases. First, SunCom did not request authority for aggregation, but rather sought a declaratory ruling with respect to assignment requests that would be filed after construction. Moreover, in its Third Report, the Commission expressly ruled that while it will "generally" not permit aggregation prior to construction, it will permit post-construction aggregation upon a proper showing. Finally, were there a need to have a system constructed prior to presenting justification, such need would presumably stem from a requirement to show existing system use, as opposed to projected use, and the Commission would have abandoned its age-old loading formulas and elected to broaden the types of permissible showings, as it did in its 220 MHz Order, 6 FCC Rcd 2356, 2364, n. 126 (1991). Under such circumstances, it is clear that the status of system construction is relevant with respect to when systems can be aggregated and not to when a showing justifying such aggregation can be made.

^{7/} See 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. See also Orth-O-Vision, Inc., 82 FCC 2d 178, 184-185 (1980); AT&T Co., 3 FCC Rcd 5071, 5071-72 (Com. Car. Bur., 1988).

of the matter complied with applicable procedural requirements. Gardner v. FCC, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976).

7. Because a declaratory ruling is an adjudicative ruling, see Chisholm v. FCC, 538 F.2d 349, 364 n.30 (D.C. Cir.), cert. denied, 429 U.S. 981 (1976), the Commission took on the role of an adjudicator when it decided to consider SunCom's request. In that role, the Commission had an obligation to rule on the question presented by SunCom. AT&T Co. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 113 S.Ct. 3020 (1993).

8. The Commission ultimately did not hold that its decision to pass on SunCom's Declaratory Ruling Request was improvident. Rather, the Commission ruled on the merits. Declaratory relief was denied on the erroneous belief that SunCom proposed the pre-construction aggregation of channels. See Third Report, at para. 129.^{8/} No other reason for the Commission's ruling can be gleaned from its decision.^{9/}

9. The Commission only reiterated its current standard for judging a request for an "exemption" from the 40-mile rule of Section 90.739. See Third Report, at para. 129. That standard

^{8/} The Commission's ruling was clearly erroneous inasmuch as SunCom proposed post-construction aggregation. See Declaratory Ruling Request, at 2.

^{9/} Before addressing SunCom's two requests, the Commission stated that a "more comprehensive record" was necessary before it could consider a "new licensing scheme based on different sized channel blocks or service areas." Third Report, at para. 127. Consideration of a new licensing scheme was not material to SunCom's requests, both of which assume the validity of the present licensing scheme.

comes into play when an applicant seeks authorization of an "additional system", see 47 C.F.R. § 90.739, or "additional channels or channel groups", see 220 MHz Order, 6 FCC Rcd at 2364, 2375 n.126. However, it has no bearing on SunCom's requested declaratory ruling.

10. SunCom does not plan to ask the Commission to issue any authorizations for additional systems or channels. It seeks Commission consent to the assignment of licenses for already authorized and constructed systems. See Declaratory Ruling Request, at 2; Waiver Request, at 4 n.7. And SunCom does not seek an "exemption" to the 40-mile rule. SunCom petitioned for a declaratory ruling that no Section 90.739 "exemption" was necessary to obtain Commission consent to acquire the licenses for constructed systems.

11. The Commission simply did not address in its notice and comment proceeding the specific request for declaratory relief posed by SunCom. That failure violated the Commission's duty as an adjudicator. See 5 U.S.C. § 555(b); AT&T, 978 F.2d at 732. Moreover, the Commission's inaction was inconsistent with the interests of administrative economy.^{10/} And by allowing the uncertainty

^{10/} When considering whether to entertain an action for declaratory relief, the determinative factor is whether a declaratory ruling will result in a just, expeditious and economical determination. See C. Wright, Law of Federal Courts § 100, at 671 (4th ed. 1983). In this case, the Commission apparently concluded that SunCom's requested declaratory ruling could be considered most efficiently in the context of this docket. Then, after the parties and the Commission expended their resources on the matter, no ruling on the issue presented was made. That waste of effort can be remedied if the Commission grants SunCom's requests on reconsideration.

surrounding Section 90.739 to continue, the Commission provided no comfort at all to SunCom.

12. Having heard argument on SunCom's proposed ruling, the Commission was obliged to reach the merits of SunCom's request or provide an adequate explanation for not doing so. See MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39-40 (D.C. Cir. 1990). At this point, the Commission has done neither. And in this instance, where delay may well extinguish the value of the subject licenses that are scheduled to expire on April 4, 1995, justice delayed truly is justice denied.

B. The Commission Did Not Give An Adequate Reason For Denying The Waiver Request

13. Nonfrivolous requests for rule waivers are not subject to perfunctory treatment, but must be given a "hard look". P&R Temmer v. FCC, 743 F.2d 918, 929 (D.C. Cir. 1984); KCST-TV, Inc. v. FCC, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). These cases dictate that the Commission "articulate with clarity and precision its findings and the reasons for its decisions." Id. at 1156. It is obvious from the Commission's treatment of the matter that no hard look was given SunCom's Waiver Request.

14. The Commission's disposition of SunCom's Waiver Request could not have been more perfunctory. The Commission devoted two sentences to the request. No findings were made. The Commission only stated its conclusion that SunCom had not demonstrated the existence of "extraordinary circumstances" warranting waiver of

Section 90.725(f). Third Report, at para. 129. And no reasons were given for that conclusion.

15. Because it clearly did not engage in reasoned decision-making, the Commission's summary action can stand only if SunCom's waiver request had insufficient merit to warrant reflective consideration. See WAIT Radio, 418 F.2d at 1157-58. SunCom will show that its request deserved a hard look, and that the Commission's action was so inconsistent with precedent as to raise due process concerns.

16. Contrary to the Commission's conclusion, SunCom did not have to demonstrate the existence of extraordinary circumstances to obtain a rule waiver. Part 90 rules are waived upon "a showing [1] that unique circumstances are involved, and [2] that there is no reasonable alternative solution within existing rules." 47 C.F.R. § 90.151. And under "well established waiver standards" applicable to Part 90 construction requirements, the Commission recognizes the "uniqueness" of complex networks of the type proposed by SunCom. See Mobile Radio New England, 8 FCC Rcd 349, 350 (1993).

17. Since 1983, the Commission has followed a waiver policy under which the construction of large-scale, spectrally efficient, and technologically complex networks constitutes a "unique" circumstance that makes Part 90 construction schedules inappropriate. See id.; Fleet Call, Inc., 6 FCC Rcd 1533, 1536 (1991); American Mobile Data Communications, Inc., 4 FCC Rcd 3802, 3805 (1989); Advanced Train Control System, 3 FCC Rcd 427, 428 (1988); IBM Research and Development, Inc., 53 RR 2d 675, 677 (1983). See also Power-

Spectrum, Inc., 8 FCC Rcd 4452, 4454 (Pri. Rad. Bur., 1993). In 1991, the Commission expressly "put future parties on notice" that it would continue to apply its "clear" waiver policy to Part 90 construction schedules so as to avoid discrimination. Fleet Call, 6 FCC Rcd at 1536 (quoting Northeast Cellular Telephone Co., L.P. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). SunCom properly relied on that assurance when it submitted its Waiver Request.

18. SunCom expressly tailored its Waiver Request to the Commission's waiver policy. SunCom described its proposed network in detail, and plead with particularity the facts and circumstances that rendered compliance with an eight-month construction schedule impossible.^{11/} See Waiver Request, at 2-5, 9-11.^{12/} SunCom also specified the reasons that grant of a Section 90.725(f) waiver would be consistent with the "long line of Commission precedent granting requests to extend construction schedules". Id. at 5. And the fact that SunCom's Waiver Request mirrored requests granted in the past was enough to entitle SunCom to a reasoned decision under due process principles.^{13/}

^{11/} The Commission has recognized that it can be "impossible" for a waiver applicant to describe the construction demands of a complex system with precision at the developmental stage. See American Mobile, supra, 4 FCC Rcd at 3805.

^{12/} See also Fleet Call, where the Commission recognized that it can be "virtually impossible" for technically complex systems to be constructed within the construction time frames set forth in Part 90 of its rules. 6 FCC Rcd at 1536.

^{13/} It cannot reasonably be argued that the SunCom Waiver Request was different in nature from the multitude of other extended implementation requests granted by the Commission. While the
(continued...)

19. As the Commission implicitly recognized in Fleet Call, the rule of Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) is applicable in waiver cases. A party denied a waiver can invoke the Melody Music doctrine of similar treatment when precedent is "inexplicably ignored". New Orleans Channel 20, Inc. v. FCC, 830 F.2d 361, 364 (D.C. Cir. 1987). The doctrine is appropriately applied here, because the Commission ignored both prior precedents and its Fleet Call promise to avoid disparate treatment of waiver applicants, especially with regard to the DCL waiver request. See 6 FCC Rcd at 1536.

20. The Commission's action is so inconsistent with its waiver policy as to raise doubts as to its continuing vitality. If it abandoned its waiver policy, the Commission was obligated to provide a reasoned analysis indicating that the policy had been "expressly changed and not casually ignored." Thomas Radio Co. v. FCC, 716 F.2d 921, 924 (D.C. Cir. 1983). By providing no analysis, the Commission "crossed the line from the tolerably terse to the intolerably mute." WAIT Radio, 418 F.2d at 1153.

13/ (...continued)

facilities at issue in Fleet Call were being reconfigured, those at issue in American Mobile, supra; Millicom, see letter of Richard J. Shiben to Robyn G. Nietert, dated May 17, 1990; Dial Page, see letter of Terry L. Fishel to Gerald S. McGowan, dated March 17, 1993; and DCL Associates, Inc., see letter of Michael J. Regiec to Raymond A. Kowalski, dated August 31, 1994, were all unconstructed. Yet each was granted. (Copies of each of the unreprinted letter decisions are attached.) Significantly, while extended construction authority was granted to Fleet Call, American Mobile, Millicom, and Dial Page before SunCom made its request, such relief was granted to DCL Associates at the very time that the SunCom Waiver Request was being denied.

21. The denial of SunCom's waiver also created inconsistency within the four corners of the Third Report. After refusing to waive the construction schedule for SunCom, the Commission proceeded to grant its third extension of the Section 90.725(f) construction deadline for all 220 MHz licensees. See Third Report, at 127 n.233, 90. See also Order in PR Docket No. 89-552, 9 FCC Rcd 1739 (Pri. Rad. Bur., 1994). In effect, the Commission waived Section 90 725(f), because the law treats an extension of time to construct as a rule waiver. See New Orleans Channel 20, 830 F.2d at 364, 367; Channel 16 of Rhode Island, Inc. v. FCC, 440 F.2d 266, 276 (D.C. Cir. 1991).

22. The Commission extended the construction deadline because of the limited availability of 220 MHz equipment. See Third Report, at para. 184. However, the Commission did not find that "unique" (or "extraordinary") circumstances were involved. Nor did it explain why it granted a blanket waiver to all 220 MHz licensees but denied SunCom's particularized request.^{14/}

23. There is good reason to preserve the integrity of a rule that has been followed without exception. See Basic Media Ltd. v. FCC, 559 F.2d 830, 8333-34 (D.C. Cir. 1977). However, since its adoption, Section 90.735(f) has never been enforced. And the rule is among a group of Part 90 construction schedules that has been

^{14/} The Commission's determination to deny the SunCom Waiver Request, while granting blanket relief -- with a uniform expiration date that was unrelated to license grant dates -- is most peculiar in view of the fact that the record in this proceeding does not reflect that any request for such unified relief was made by any 220 MHz licensee.

repeatedly waived under a publicly announced policy. Such considerations clearly undercut the Commission's decision to strictly enforce Section 90.735(f) against SunCom.

III. Conclusion

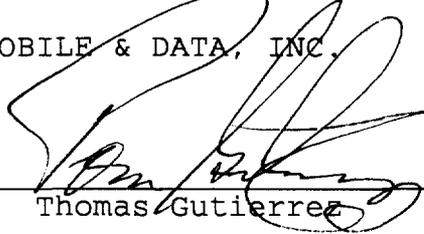
For all the foregoing reasons, SunCom requests that the Commission (a) issue a declaratory ruling that SunCom's post-construction acquisition plan is permitted under Section 90.739; (b) waive Section 90.725(f) to afford SunCom adequate time to place the network into operation; and in any event (c) provide a reasoned explanation for its decision on reconsideration.

Respectfully submitted,

SUNCOM MOBILE & DATA, INC.

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By


Thomas Gutierrez

Its Attorney

December 21, 1994

Attachment A

Letter of Richard J. Shiben to Robyn G. Nietert
dated May 17, 1990
in re Millicom

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

MAY 17 1990

IN REPLY REFER TO:
7320-12/LMK-205

Robyn G. Nietert, Esquire
Brown, Finn & Nietert, Chartered
Suite 660
1920 N Street, N.W.
Washington, D.C.: 20036

In re: Millicom Radio Telephone Company, Inc. Request
for Waiver and Other Relief

Dear Ms. Nietert:

Millicom Radio Telephone Company, Inc. (Millicom) seeks waiver and other relief to permit construction of a nationwide two-way mobile data and voice communications network in the 900 MHz band. Millicom states that its network will include one to six 10-channel base repeater sites in strategically located urban areas throughout the country. Each voice/data system will feature ten base station repeaters connected to a central processor or repeater site manager unit that will direct transmissions through a local area network controller to local terminal voice or data units or via public telephone system digital interface to a remote voice unit, host computer or public data base. The system will handle data transmissions in the digital format and voice transmissions in an analog format until digital technology is available. Millicom states that its proposed network will be efficient and flexible, making use of an open architecture. The system will be innovative and complex in that voice and digital data transmission will be possible on the same channel, Millicom concludes.

The American SMR Network Association, Inc. (ASNA), Metrocast and RAM-Mobile Data, Inc. (RAM) have filed pleadings opposing Millicom's request. Various responsive pleadings have been submitted as well. ASNA and Metrocast assert that relief can be granted properly only through the rule making process. Our Memorandum Opinion and Order, American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989), (the AMDC decision), holds otherwise, and we reject their argument on this ground.

The RAM pleading, in contrast, focuses primarily upon the technical characteristics of the Millicom proposal, a focus inspiring lively debate between Millicom and RAM as to the relative merits of their proposed nationwide networks. (The RAM proposal was the subject of our AMDC decision). While this debate is of interest, it does not resolve the issue actually before us. This issue is not, as the parties suggest, whether the Millicom proposal is "innovative," "advanced," or "complex" in comparison with the RAM proposal. Rather, we must evaluate the Millicom proposal on its own terms and determine whether waiver is justified on this basis.

Extended construction schedule and related relief. Millicom seeks waiver of Sections 90.631(e) and (f) of our Rules, 47 C.F.R. §§ 90.631(e) and (f), to permit a three year construction period for network participants. It cites lack of necessary equipment and complexities of construction as grounds for relief. As a related matter, Millicom asks also that it be given four years from its construction deadline to load its facilities. Millicom cites our AMDC decision as precedent for this request, noting that comparable relief was granted in that document.

According to the pleadings, stations participating in the Millicom network will be constructed in one of two manners. In markets where voice-only operation is economically feasible, stations will be built and operated as voice-only SMR systems and will be converted to voice/data systems as circumstances dictate. Millicom does not seek waivers of the construction deadline in these markets and none are necessary for its purposes.

In markets where voice-only operation is not economically feasible, Millicom proposes to build voice/data systems at the outset. Immediate construction of such stations is not possible, Millicom alleges, because some essential components -- in particular the repeater site manager and the vehicle, hand-held and stationary data terminals -- are not currently available in the marketplace. At the same time, it urges, construction of voice-only stations that are not economically viable would be fruitless.

The Communications Act of 1934, as amended, directs us to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more efficient use of radio in the public interest," 47 U.S.C. § 303(g). Our AMDC decision honored this directive by granting AMDC extensions of time to construct a nationwide digital network too complex and innovative to be completed within the usual one year period.

We are satisfied that Millicom has justified an extension on similar grounds of complexity and innovation. According to its pleadings, Millicom faces a number of construction requirements different from those of a typical voice-only SMR system. These include the necessities of selecting and acquiring multiple sites within individual DFAs, of combining and coordinating system designs and operations, of modifying existing hardware and software and of implementing a computer system on a national basis. Further, Millicom must acquire for its system equipment that is currently under development but is not as yet commercially available. We are convinced by the information before us that these tasks are sufficiently unusual to justify additional construction time. At the same time, we find sufficient evidence of study, planning and progress to assure us of Millicom's good faith and intention to construct.

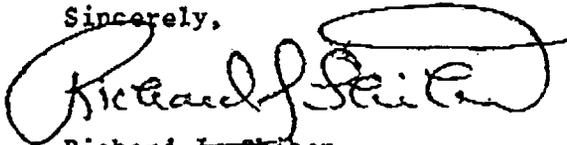
We will accordingly grant Millicom three years in which to construct its system. To guard against spectrum hoarding, we will require in markets where waiting lists develop that Millicom construct a voice/data system within 90 days of the establishment of a waiting list. If this or other construction deadlines are not met, the individual license will cancel automatically. As a condition of this relief, we will require that Millicom submit annual reports of its progress after grant. Licensees meeting construction requirements will be afforded four years from the construction deadline to load their systems.

We have extended the construction periods of certain network participants pending final action on Millicom's request. These participants are included in the relief granted here. We will not, however, grant relief to network participants who fail to seek extensions of time before the construction period expires. Once a license has cancelled automatically, participation in the Millicom network will not justify its reinstatement.

Technical relief. Millicom asks that it be permitted to split channels, use specific blocks of frequencies, switch frequencies and short space channels with simple prior notice rather than express Commission approval. It argues that this task is best left to it, given the large number of potential network participants per market. We do not reject this argument outright; rather, we find it premature. Should Millicom construct its network, and should its operation require modifications of a number and scope so large as to overwhelm Commission processing resources, then this may prove beneficial. Until such time, however, we see neither need nor basis for eliminating our prior approval requirement.

We conclude in light of the above that waiver and other relief is partially warranted. Millicom's request is accordingly granted in part and denied in part. Sections 90.631(e) and (f) of the Commission's Rules, 47 C.F.R. §§ 90.631(e) and (f) are waived to permit identified participants in Millicom's network three years to construct their systems. This waiver is conditioned upon the requirements specified herein.

Sincerely,



Richard J. Shiben
Chief, Land Mobile and Microwave Division

Copies to: Russell H. Fox, Esquire
Elizabeth R. Sachs, Esquire
Gregg P. Skall, Esquire
Henry Goldberg, Esquire

Attachment B

Letter of Terry L. Fishel to Gerald S. McGowan
dated March 17, 1993
in re Dial Page

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

MAR 17 1993

In Reply Refer To:
7110-18

Gerald S. McGowan, Esquire
George L. Lyon, Jr., Esquire
Lukas, McGowan, Nace & Gutierrez, Chartered
1819 H Street, N.W., 7th Floor
Washington, D.C. 20006

Re: Dial Page, Inc.'s waiver request to implement a wide-area digital SMR system

Dear Messrs. McGowan and Lyon:

Dial Page, Inc. (Dial Page) requests a waiver of Rules 90.631(e) and (f) to implement a wide-area digital SMR system in the southeastern U.S. The trunked digital network would be implemented over a nine state region and would provide service in 82 predominantly secondary markets. Dial Page indicates that its regional system will fill gaps between SMR systems in major markets and provide a "virtually seamless, ubiquitous network extending from northern Virginia through southern Florida". As well, Dial Page advises that the use of digital technology will provide compatibility between other recently authorized urban SMR systems and enable it to efficiently provide a myriad of services and options.

Rules 90.631(e) and (f) require that a trunked 800 MHz facility be constructed and placed in operation within one year of license authorization or the license cancels automatically. Dial Page requests a period of five years to construct and make its requested facilities operational. It argues that its request is warranted because of the technical and logistical complexity of the proposed project and it advises that its request is consistent with the Commission's actions in AMDC, IBM Research and Development, Inc., Advanced Train Control System, Fleet Call, Inc., and Millicom Radio Telephone, Co. Dial Page indicates that its multi-state digital network will require the commitment of substantial financial and human resources and estimates that its implementation will require a multi-year effort.

Based on the magnitude, logistical and technical complexity of the system as proposed and the resources necessary to construct and make such a system operational, we are approving Dial Page's requested waiver of Rules 90.631(e) and (f) to allow it five years to construct and make operational its wide-area system subject to it submitting an acceptable implementation schedule. Annual reports of its progress in implementing the network must be submitted demonstrating conformance with this schedule as a condition of this action.

Dial Page advises that the Commission's Rules dealing with loading requirements and channel acquisition inhibit SMRs from obtaining adequate capacity to warrant investing in advanced technology in secondary markets. Dial Page indicates that there are several other applicants that have requested SMR facilities in markets included in its multi-state network and that it is hopeful those applicants will be "participants" in its network. Based on Dial Page's showing and consistent with the Commission's action in AMDC, we are also hereby granting Commission approved participants of the Dial Page network waivers of Rules 90.631(e) and (f) to permit those participants five years to construct and place their facilities into operation. Those participants must be identified in Dial Page's implementation schedule, must individually request a waiver of Rule 90.631(e) and (f) for the stations authorized to them which will be a part of the network, must demonstrate why those stations are a necessary part of the network and must indicate their acceptance to construct their facilities in accordance with the implementation schedule provided by Dial Page and as a participant of the digital network authorized to Dial Page. If a participant chooses to leave the network prior to construction of its facility, it must construct and operate its facility consistent with the terms of its license and in accordance with the one year construction and placed in operation requirement. Failure of participants to comply with these conditions will result in cancellation of its authorizations for those facilities.

Sincerely,



Terry L. Fishel
Chief, Land Mobile Branch

-best way to get LP program into SU
 -question for
 ? -split cost of SR channels - they could get it out
 -channelgate plan for everybody
 -harvest provision
 -due diligence-

Attachment C

Letter of Michael J. Regiec to Raymond A. Kowalski
dated August 31, 1994
in re DCL Associates, Inc.

Federal Communications Commission

1270 Fairfield Road
Gettysburg, PA 17325-7245

In Reply Refer To:
7110-227

AUG 31 1994

Raymond A. Kowalski
Keller and Heckman
1001 G St., NW, Suite 500 West
Washington, DC 20001

RE: DCL Associates, Inc.
Request for Extended Implementation

Dear Mr. Kowalski:

On May 11, 1994, DCL Associates, Inc. (DCL) was granted interim relief to defer the construction deadline for some its 800 MHz trunked SMR systems. This relief was granted primarily as a measure to allow the Commission time to process DCL's substantial number of applications. DCL was invited to refile its request when enough licensed channels were available to DCL to make its system viable. DCL certified on August 8, 1994, that between 55% and 60% of its applications had been processed with 1655 licensed channels in 65 different market areas. In light of this information, we are prepared to decide on DCL's request for extended implementation. This action will cover all licenses held by DCL granted prior to August 31, 1995. Any licenses granted after this date which may require an extended implementation period must be considered separately and will not be covered by this action.

DCL is granted extended implementation consistent with it meeting the following schedule:

By September 30, 1994, DCL must provide the Commission with a full report listing all authorizations which are included in its wide area network.

By December 31, 1995, DCL must provide the Commission with a business plan outlining its proposed construction schedule, and an update on system funding.

By December 31, 1996, DCL must have at least 10% of its channels constructed and operational.

By December 31, 1997, DCL must have at least 50% of its channels constructed and operational.

By December 31, 1998, DCL must have all its channels constructed and operational.