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DEC 19 1994
FEDERAL COMMUNICATIONS COMMISSION

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

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
	)	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-Common Carrier Service	)	CC Docket No. 94-46 RM-8367
	)	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service	)	CC Docket No. 93-116

To: The Commission

SUSSEX CELLULAR, INC.

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December 19, 1994

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Summary

In principal part, the Commission correctly declined to adopt in its R&O the proposal set forth in the Further Notice to subject all pending 931 MHz cases, including applications that have been granted, denied or dismissed but are subject to pending petitions for reconsideration or applications for review, to the new Part 22 rules, returning all such "applications" to pending status. However, the conclusion that "some" pending cases nonetheless may have to be treated under the new rules is not well grounded and should be reconsidered. All pending cases should be treated consistently, applying the old rules. While premised on fears of "reversal" and unexplained concern that "it may not be possible to resolve some of these [pending] cases under the existing rules", it is far more likely that excepting an undefined category of pending cases for blanket discriminatory and harmful treatment (i.e., returning granted applications to pending status) will be reversed as unreasoned decisionmaking. The Commission stands on firmer ground making a good faith effort to resolve each pending case on its merits under the old rules. The R&O also fails to deal adequately with issues raised by commenters concerning the lawfulness of summarily resolving (or ignoring) issues raised in pending petitions for reconsideration or review.

In the event the Commission declines to reconsider its decision to subject "some" pending cases to the new rules, returning the effected "applications" to pending status, the license granted to Sussex for 931.6625 MHz serving New York City

should not be among them. Pending pleadings in this proceeding can and should be readily resolved under the old rules, and the grant to Sussex affirmed.

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To: The Commission

PETITION FOR RECONSIDERATION

Sussex Cellular, Inc. (formerly Enhanced Telecommunications Services, Inc.) ("Sussex"), pursuant to Section 1.429 of the Commission's Rules, hereby requests the Commission to reconsider certain aspects of its treatment of 931 MHz licensing procedures in its Report and Order, FCC 94-201, released September 9, 1994 in this proceeding (the "R&O").[1]

[1] This petition for reconsideration is timely filed within 30 days of November 17, 1994, the publication of the R&O in the Federal Register.

I. INTRODUCTION AND BACKGROUND

A. The Commission's Report And Order

Among other things, the R&O implements revised processing procedures for 931 MHz paging applications. Under the old rules (Section 22.501(p)(2)(i)), applicants for an initial channel did not specify the frequency applied for, but were permitted to indicate a non-binding "frequency preference." Under the new rules, applicants are required "to specify the frequency for which they seek authorization and the frequency requested must be deemed to be available under the relevant rules adopted in this rule making proceeding." (R&O, ¶ 95). During the course of this proceeding, the Commission proposed to retroactively apply the revised processing procedure to pending applications, and to include within the pending application category applications that had been granted, denied or dismissed under the old rules, but were the subject of pending petitions for reconsideration or applications for review, returning all such "applications" to pending status and processing them under the new rules.[2] Specifically, the Commission proposed that:

- All pending 931 MHz applications, plus all 931 MHz "applications" that have been granted, denied or dismissed and are the subject of petitions for reconsideration or applications for review, would be required to be amended to specify a particular frequency;
- Applicants would be required to amend to a frequency that was available at the time the "application" was filed;
- Formal FCC Public Notice of the "applications", as amended to specify frequency, would be republished;

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[2] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, Further Notice of Proposed Rulemaking, 9 FCC Rcd 2569 (1994) ("Further Notice").

- New 931 MHz applications mutually exclusive with the amended "applications" could be filed during the 30-day period following republication of Public Notice;
- Mutual exclusivity would be resolved through competitive bidding or lotteries. (Further Notice, ¶¶ 15-17).

In response to comments objecting to the proposed retroactive application of the new processing procedures to previously granted, denied or dismissed applications, the Commission modified its proposal, determining that the new procedures would apply only to "some" previously granted, denied or dismissed applications in circumstances where it "may not be possible to resolve" the issues presented in the pending petitions for reconsideration or review. (R&O, ¶ 98).

B. Sussex's License For 931.6625 MHz

Sussex operates a 931 MHz paging system serving New York City. Sussex received its license to operate on the frequency 931.6625 MHz pursuant to a settlement of protracted multi-party litigation in connection with the New York City 900 MHz Lottery PMS-31. The litigation had its genesis in the outcome of a lottery conducted to determine which of five applicants for 900 MHz paging station authorizations in the New York City area would receive the four frequencies which, at the time of the lottery, the Common Carrier Bureau believed to be available for assignment. The applicants involved in the lottery filed their applications between May and August, 1988 without specifying frequencies requested in accordance with the then applicable processing rules. The lottery notice, issued July 17, 1989, announced that five applicants had filed mutually exclusive

applications for the four available frequencies,[3] without naming the frequencies.

By Public Notice released August 24, 1989, the Mobile Services Division released the results of the lottery, ranking the applicants as follows: MTEL Paging, Inc., Page America of New York, Inc., Tri-State Radio Company, Alpha Express, Inc., and Sussex. Although Sussex was the third of the five applicants to file its applications, the results of the lottery denied Sussex a frequency assignment, based upon the assumption (mistaken, as it later turned out) that there were four frequencies available for assignment. Sussex subsequently requested reconsideration of the staff's decision to include its applications in the lottery and to grant the Alpha Express, Inc. and Tri-State Radio Company applications.[4] Reconsideration was denied by the Common Carrier Bureau and, on January 11, 1991, Sussex filed an application for review of the Bureau's order denying reconsideration with the Commission.[5]

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[3] The applicants were: Page America of New York, Inc., Com/Nav Marine, Inc. (now named MTEL Paging, Inc.); Sussex (then named Enhanced Telecommunications Services, Inc.); Contact Communications, Inc. (now named Alpha Express, Inc.); and Tri-State Radio Company. For the sake of simplicity, all applicants are referred to subsequently herein by their current names.

[4] Sussex's petitions noted that its applications should not have been subject to the lottery since, with respect to the Sussex applications and the two prior-filed applications, one of the two components necessary under Rule Section 22.31 to a consolidated disposition of the applications -- electrical mutual-exclusivity -- was lacking. Therefore, Sussex argued, the Bureau should have granted each of first three applications in their filing order, leaving the fourth frequency to be lotteried between the later-filed applicants .

[5] While the petitions for reconsideration were pending before the Bureau, Sussex filed two supplements informing the Bureau of two additional 931 MHz frequencies that were available but not assigned to the lottery participants, requesting the Bureau to assign those frequencies and, thereby, terminate the controversy. Also during this time, the Bureau determined that one frequency

Ultimately, settlement of this controversy was approved by the Mobile Services Division by letter dated June 24, 1992 (63500-DHS) ("MSD Letter"). To facilitate expedited commencement of service on "scarce 900 MHz frequencies in the New York area," in order to meet "a current and vital public need" (MSD Letter, p. 2), the Mobile Services Division agreed to a comprehensive frequency assignment plan. Subsequently, although it did not participate as a party to the PMS-31 proceeding, and was therefore without standing, another applicant, Paging Partners, Inc., filed a petition for reconsideration of the MSD Letter challenging the license awarded to Alpha Express, Inc. (then known as Contact Communications, Inc.) on grounds that it had pending an application expressing a preference for the frequency awarded to Alpha Express, Inc. under the plan. While the petition is not expressly directed to nor does it challenge Sussex's grant, on August 21, 1992, Sussex opposed the petition since, like Alpha Express, Inc., Sussex received its grant pursuant to the MSD Letter and has an interest in maintaining the integrity of the plan.

Since the Commission has determined that the new 931 MHz procedures adopted in the R&O may apply to "some" previously granted, denied or dismissed applications (R&O, ¶ 98), Sussex's interests are directly affected by the Commission's decision.

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it had thought was available had been licensed to another carrier and was thus not available.

II. ARGUMENT

A. Having Determined That Application Of The New Rules To Pending 931 MHz Cases Is Fundamentally Inappropriate, The Commission Should Apply The Old Rules To All Such Pending Cases In A Uniform And Non-Discriminatory Manner

Based on comments submitted in response to the Further Notice, the R&O acknowledges that the Commission's tentative decision to subject pending cases (i.e., applications that have been granted, denied or dismissed but are subject to pending petitions for reconsideration or applications for review) to the new rules, thereby returning them to "pending status", was wrong. Reversing its earlier view, the Commission concludes that "to the extent possible, all of these cases should be decided under the existing rules." (R&O, para. 98). Citing the "ambiguous and confusing nature of our existing rules and related practice and precedent", however, the Commission further concludes that "it may not be possible to resolve some of these [pending] cases under the existing rules." In such cases, the Commission states, "we see no alternative but to return the applications, even if initially granted, to pending status." (R&O, para. 98). The Commission appears to delegate to the Chief, Common Carrier Bureau, responsibility for determining which pending cases should be processed under which rules, but provides no standard for such determinations. (R&O, para. 99).

The Commission should reconsider its decision to subject "some" pending cases to the new rules. The Commission has correctly determined, as a matter of principle and proper procedure, that application of the new rules to pending cases

would be inappropriate. Clearly, if it is wrong to apply the new rules in pending cases, they should not be applied to any pending cases. It is especially unfair for the Commission to premise the supposed need for discriminatory treatment of certain pending cases upon its own past mistakes in adopting rules and related practice and precedent that may have been ambiguous and/or confusing particularly where, as here, Sussex and other licensees who have proceeded with construction and operation of 931 MHz facilities in reliance upon Commission authorization would be penalized.

Contrary to the Commission's conclusion, there is an "alternative" to its extraordinary proposal to treat "some" pending cases differently from others: the Commission can and should process all pending cases under the old rules, applying the rules on a consistent and uniform basis, taking into consideration the particular circumstances of each case.

The Commission's only stated reason for not proceeding in this fashion -- "that granting, denying, or dismissing applications pursuant to such ambiguous and confusing rules could only lead to reversal, regardless of what action we take" (R&O, para. 98) -- is inadequate. Fear of judicial reversal is not in and of itself sufficient justification for an administrative action, cannot serve as an exception to the requirement for reasoned decision-making, and provides no basis for declining to resolve pending requests for reconsideration or applications for review of actions taken under delegated authority. Obviously, there is always the possibility that decisions made by the

Commission in resolving individual pending cases under the old rules might be subject to reversal if, in fact, the Commission fails to decide such cases based upon a consistent application of its rules to the facts presented. However, it is far more certain that judicial reversal will follow if the Commission subjects only some of the pending cases to disparate and discriminatory treatment under the new rules and, in the process, returns to pending status granted, built and operating authorizations, simply because the Commission finds it burdensome or difficult to interpret and apply its old rules.

B. The Commission's Decision Does Not Comply With The APA's Requirements For Reasoned Decision-Making

It is ironic the Commission bases its decision to return some 931 MHz grants to pending status upon fears of reversal. Even setting aside for the moment questions surrounding whether returning grants to pending status and processing them under the new rules would be reversible because such action would exceed the Commission's authority (i.e., constitute unlawful retroactive rulemaking or be contrary to the provisions of Section 405 of the Communications Act), the procedure chosen by the Commission in the R&O fails to pass muster under the very APA requirements for reasoned administrative decision-making with which the Commission is apparently concerned. Section 10(e) of the Administrative Procedure Act requires a reviewing court to set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[6] In applying this

[6] 5 U.S.C. § 706(2)(A).

requirement, reviewing courts must "determine whether the Commission's decision was a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record."[7] Here, the Commission's proposed return-to-pending-application-status disposition of "some" pending cases would completely ignore both the "relevant factors" and the "record" -- i.e., its old rules under which the applications were filed, the pending pleadings and circumstances presented in each case, and salient differences between cases -- for no apparent reason other than to avoid the Commission's having to consider the relevant factors and record in each case. Such an approach exemplifies an inherently arbitrary abuse of administrative discretion that is unlikely to withstand judicial review.

In contrast, because "[t]he scope judicial review under this standard is narrow and an agency's interpretation of its own policies and prior orders is entitled to deference",[8] the Commission has far less to fear if it resolves all pending cases under the old rules. The Commission's old rules and related policies and precedent may indeed be ambiguous and confusing, but they remain the Commission's rules, policies and precedent, and the Commission's interpretation of them will therefore be accorded the deference required by the narrow scope of permissible judicial review. If the Commission resolves these

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[7] People of State of Cal. v. FCC, 905 F.2d 1217, 1230 (9th Cir. 1990).

[8] People of the State of California, et al. v. FCC, 1994 U.S. App. LEXIS 29001, 290015.

cases with reasonable care and on a consistent basis, it has no reason for concern with reversal. No deference will be given, however, if the Commission chooses to ignore its rules, policies and precedent and the related pleadings pending before it in these cases as has been proposed in the R&O.

The innate arbitrariness of the approach adopted in the R&O with respect to the unidentified but allegedly "impossible" to resolve category of pending cases is exacerbated by the fact that the Commission has articulated no standard whereby it (or its staff) will distinguish those pending cases to be processed under the old rules from those to be processed under the new rules. Not only does the R&O provide no indication of the criteria, if any, under which it will be determined which pending cases are "impossible" to resolve under the old rules, it is difficult to imagine how the Commission could reasonably fashion such criteria. It is to be expected that the pending cases will fall across a spectrum of difficulty in terms of the number and thorniness of issues to be resolved. Attempting to draw a line at a point where these cases become "impossible" to resolve under the old rules would be inherently and of necessity arbitrary.

Understandably, such an ad hoc approach has been found wanting under the arbitrary and capricious standard of the Administrative Procedure Act.[9] Similarly, the Commission's

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[9] "The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations." Morton v. Ruiz, 415 U.S. 199, 232 (1974). "[I]n such a case the agency must, at a minimum, let the standard be known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries." Id. at 231

approach would be subject to attack under the "hard look" doctrine as applied to arbitrariness review in Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied 403 U.S. 923 (1971). Focusing the inquiry on the agency, a reviewing court applying the "hard look" doctrine "acts as a supervisor to assure that the *agency* has done its job",[10] and may overturn an administrative decision "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a `hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making."[11] In short, the Commission may not discriminate against "some" applicants whose licenses were granted under the old rules simply because the Commission may find it burdensome to resolve issues raised in pending petitions for reconsideration or applications for review.

C. The Commission's Proposal To Return Processed Applications To Pending Status Contravenes Section 405 Of The Act, Established Processing Procedures And Related Precedent, And Otherwise Exceeds Its Authority

The Commission's decision to summarily return to pending status 931 MHz authorizations that have been granted, dismissed or denied but are subject to petitions for reconsideration or applications for review, without resolving the issues presented in such petitions and related pleadings, runs counter to the

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[10] Charles H. Koch, Jr., Administrative Law and Practice, Vol. 2, § 9.6, p. 106 (West Publishing Co., 1985).

[11] 444 F.2d at 851. The United States Supreme Court employed a similar approach in Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983).

requirements of Section 405 of the Communications Act. Specifically, Section 405(a) provides for the filing of petitions for reconsideration of Commission orders, decisions reports or actions by parties to proceedings in which such actions are taken, or by persons aggrieved or whose interests are adversely affected by such actions, and expressly requires that the "Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying the petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate."[12] Under the procedure adopted in the R&O for "some" pending cases, the Commission would neither issue any such order, nor grant or deny pending petitions for reconsideration or review. The Commission's actions would therefore be unlawful.[13]

Several parties filing comments in response to the Further Notice argued forcefully that Section 405 of the Communications Act and long-established application processing procedures and precedent precluded the wholesale return-to-pending-status of earlier disposed of 931 MHz applications proposed by the

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[12] 47 U.S.C. § 405(a).

[13] In one sense, the Commission's action might be viewed as granting or denying the pending petitions for reconsideration or review. For example, to the extent a granted authorization that is the subject of a pending petition for reconsideration filed by a competing applicant is returned to pending status under the Commission's R&O, the relief requested by the petitioner has been effectively granted. Of course, disposition of the issues raised by the petitioner in this manner would still not satisfy the requirements under Section 405 for the issuance of an order including the "reasons therefor", and would still be an arbitrary and capricious abuse of the Commission's discretion.

Commission.[14] These arguments, which apply equally to the more restricted application of the return-to-pending-status policy adopted in the R&O, are on the record and need not be reiterated here. The point is that, with the exception of the issue of whether the Commission's action constitutes "retroactive rule making", the R&O completely fails to address the larger questions concerning the legality of its action, nowhere even mentioning Section 405 of the Act in its disposition of this issue.[15]

Moreover, the Commission's analysis of the retroactive rule making issue is itself flawed, seeming to confuse or to use interchangeably the wholly distinct concepts of "pending" applications and "finality" of granted authorizations (or of orders denying or dismissing applications). In the Commission's view, "an application remain[s] pending [where] petitions for reconsideration or applications for review" have been filed. R&O, ¶ 100. The Commission, however, cites no precedent in support of this extraordinary proposition and ignores contrary precedent. It is well established that authorizations issued by the Commission remain valid "until there occurs an actual forfeiture, either by abandonment of the permit by the original permittee or by adverse-and-valid administrative action" by the Commission. Mass Communicators, Inc. v. FCC, 266 F.2d 681, 18 RR

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[14] See, Comments of Pronet, Inc., pp. 3-5; Comments of Tri-State Radio Co., pp. 8-10.

[15] See, R&O, ¶ 100. It appears as though the Commission, having agreed with commenters to the extent that most of the pending cases should be decided under the existing rules, felt it unnecessary to address the Section 405 issue. Clearly, however, the issue remains for the "impossible to resolve" category of pending cases.

2098 (1959); MG-TV Broadcasting Co. v. FCC, 408 F.2d 1257, 14 RR 2d 2113 (1968). The authorizations which would be returned to pending status under the 931 MHz policy adopted in the R&O are not "pending applications", but valid licenses that became effective pursuant to Section 1.102(b) of the Commission's Rules upon release of the full text of the Mobile Services Division documents granting them. The fact that a Mobile Services Division decision in such a case may not become final because of the filing of a timely petition for reconsideration or review does not stay or otherwise affect the validity of the authorization.

D. The License Granted To Sussex Should Not Be Subject To Return To Pending Status In Any Event

Even if the Commission declines to grant reconsideration of its decision to subject "some" pending cases to the new rules, the New York City settlement should not be included among the special cases to be selected for receiving such treatment. This is not a difficult case to resolve on its merits, much less "impossible." The settlement approved in the MSD Letter was mutually agreed to and serves the public interest, having allowed expeditious initiation and continuation of service, and by fairly accommodating the needs of interested parties. It should not be upset at this late date. The petition for reconsideration of the MSD Letter filed by Paging Partners, Inc., can be readily disposed of based on both the procedural and substantive

infirmities set forth in Sussex's opposition filed August 22, 1992.[16]

As shown therein, petitioner's allegations that the frequency granted to Alpha Express, Inc. was not "available" for assignment when applied for is without merit. Section 22.4(a)(2) of the old rules did not specify when the frequency must become available. Indeed, the procedures then in effect precluded 931 MHz applicants from specifying a frequency at the time applications were filed (they could indicate only a frequency "preference"), leaving the selection of specific frequency assignments to the Commission at the time of processing and grant. Moreover, earlier in this proceeding, the staff granted a license to MTEL Paging, Inc. for a frequency which did not become "available" until three and one-half months after its lottery-winning applications were filed. (See, Application For Review filed by Sussex on January 11, 1991). Pursuant to the prohibition against discriminatory treatment of similarly situated applicants in Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965), it is clear the Commission may not decline to "reach forward" in a similar manner for Alpha Express, Inc. and Sussex. The MSD Letter correctly rectified this unjust discrimination and should be upheld.

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[16] As noted earlier, the petition for reconsideration does not directly address the authorization granted to Sussex as a result of the settlement plan approved in the MSD Letter. Thus, the Commission's policy of returning to pending status granted applications "which remain before us due to the filing of petitions for reconsideration or applications for review" (R&O, ¶ 95), even if retained with respect to certain cases, would not apply to Sussex.

III. CONCLUSION

The Commission should reconsider its decision to return certain applications which have been granted, denied or dismissed to pending status. In any event, the 931 MHz license granted to Sussex should not be subject to such treatment.

Respectfully submitted,

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December 19, 1994

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I, Elizabeth A. Fertig, a secretary in the law firm of Gardner, Carton & Douglas, certify that I have this 19th day of December, 1994, caused to be sent by first-class U.S. mail, postage-prepaid, a copy of the foregoing Petition for Reconsideration to the following:

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