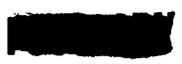


DOCKET FILE COPY ORIGINAL



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

1997

In the Matter of)	
)	
Revision of Part 22 and Part 90	)	WT Docket No. 96-18
of the Commission's Rules to)	
Facilitate Future Development of)	
Paging Systems)	
)	
Implementation of Section 309(j)	)	PP Docket No. 93-253
of the Communications Act -)	
Competitive Bidding)	

PETITION FOR PARTIAL RECONSIDERATION

PSWF Corporation ("PSWF"), by its counsel and pursuant to Section 1.106 of the Commission's Rules, hereby petitions for partial reconsideration ("Recon Petition") of the Commission's decision in its Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-59, released on February 24, 1997 ("Second R&O") to award nationwide exclusivity to Communication Innovations Corporation ("CIC").¹

Introduction

PSWF is the *pro forma* assignee of American Mobilphone, Inc. ("AMI").² AMI was an active member of the paging industry for many

¹ Section 1.106 appears to be the applicable rule here. The Commission's decision to award CIC nationwide exclusivity over PSWF's protests was adjudicative, not legislative. Thus, this Recon Petition is filed thirty days from release of the Second R&O. If the Commission decides that the appropriate rule is Section 1.429, then PSWF requests the Commission to rule on this Recon Petition pursuant thereto.

To the extent that PSWF objects to any legislative portion of the Second R&O, PSWF will file a separate petition for reconsideration pursuant to Section 1.429 within thirty days of Federal Register publication.

² The *pro forma* assignment of all of AMI's assets, (continued...)

years, having served tens of thousands of paging customers in Alabama, Georgia, Florida, West Virginia, Kentucky and Ohio in the 152 MHz, 454 MHz and 464 MHz bands. AMI/PSWF have served paging customers for more than fifteen years. (Hereafter, AMI and PSWF shall be referred to collectively as "PSWF".)

PSWF holds sufficient non-grandfathered authorizations to qualify for regional frequency exclusivity on 929.8125 MHz. The Second R&O awarded a nationwide license to CIC on 929.8125 MHz, the same frequency on which PSWF has qualified for regional exclusivity. The Commission's action injures PSWF, which therefore has standing to file this Recon Petition.

As discussed below, on April 26, 1996 PSWF filed a Petition for Declaratory Ruling ("1996 Petition") seeking a ruling that CIC did not qualify for nationwide exclusivity. In awarding nationwide exclusivity to CIC, the Commission never even addressed the substantive allegations and arguments PSWF made in the 1996 Petition. Indeed, the Commission acted as if CIC's exclusivity request had been unopposed. Based upon newly-obtained information, PSWF filed a second Petition for Declaratory Ruling against CIC on March 11, 1997, alleging that CIC had not constructed its stations in accordance with FCC rules and that CIC falsely certified completion of construction to the FCC (the "1997 Petition"). The 1997 Petition remains pending.

²(...continued)
including its FCC authorizations, was approved by the Commission and consummated as of December 31, 1996.

In this Recon Petition, PSWF argues that: 1) on the merits, CIC does not qualify for exclusivity for the reasons set forth in PSWF's 1996 Petition and 1997 Petition; and 2) the Commission's grant of nationwide exclusivity to CIC without even discussing or addressing PSWF's 1996 Petition was a blatant and material violation of Section 555(e) of the Administrative Procedures Act ("APA"), 5 U.S.C. §555(e).

I. On the Merits, CIC Is Not Entitled to Nationwide Exclusivity.

The Second R&O granted CIC nationwide exclusivity on 929.8125 MHz. According to the Commission, CIC had conditionally qualified for nationwide exclusivity under the Rules. Second R&O at ¶56. In its 1996 Petition, a copy of which is attached hereto for convenience as Exhibit A and which PSWF incorporates herein by reference, PSWF had explained that CIC had abused the Commission's application processes and committed serious violations of Section 90.495(c) of the Rules, by refileing for stations specifying transmitter locations for which CIC had previously obtained grandfathered regional-exclusive authorizations but failed to timely construct, without seeking an extension of time and without waiting one year from the expiration of the unconstructed license as required by Section 90.495(c). The 1996 Petition asked the Commission to rescind all of CIC's new authorizations which covered the same geographic areas as its unconstructed grandfathered regional exclusive licenses, or alternatively, not to allow those transmitter sites specified in the ill-gotten licenses to count

towards fulfillment of CIC's nationwide exclusivity. PSWF's arguments therein were meritorious. Those arguments required denial of nationwide exclusivity then, and they require rescission of the erroneously-granted nationwide exclusivity now.

PSWF filed its 1997 Petition shortly after the release of the Second R&O. In the 1997 Petition, a copy of which is attached hereto for convenience as Exhibit B and which is also incorporated herein by reference, PSWF demonstrated that CIC had falsely certified construction of several transmitter sites in the South Florida and Chicago areas (the areas PSWF had investigated), and that a question was raised as to whether CIC had done the same across the United States.³

As discussed in the 1997 Petition, CIC had claimed that it had constructed 334 transmitter sites necessary to attain nationwide

³ Should the Commission determine that the incorporation by reference of the 1996 Petition and the 1997 Petition results in PSWF exceeding the 25 page limit prescribed by Section 1.106(f) of the Rules, then PSWF respectfully requests a waiver of that rule. The page count for the instant Petition and the 1997 Petition combined does not exceed the page limit prescribed by Section 1.106(f), however, the incorporation of the 1996 Petition would cause the instant Petition to exceed the page limit.

A waiver of Section 1.106(f) of the Rules is appropriate because the page limitation rule presupposes that the FCC has considered the merits of initial submissions before issuing a decision, so that only issues where parties disagree need to be addressed on reconsideration. In this case, the Commission reached a decision respecting CIC's eligibility for nationwide exclusivity without consideration of the issues raised in the 1996 Petition. PSWF's procedural due process rights would be violated if such a page limitation were imposed here, where the timely-raised arguments in the 1996 Petition were not considered prior to the issuance of a decision. The public interest also requires grant of such waiver as is necessary to allow consideration of all of the information provided in both the 1996 and 1997 Petitions concerning CIC's eligibility for nationwide exclusivity.

exclusivity (including the Chicago and South Florida sites) in less than one month, suggesting that whatever the facts were respecting Chicago and South Florida would be the case respecting all 334 locations. Patently, stations which were falsely certified as having been constructed cannot support a grant of exclusivity. PSWF's evidence also showed that to the extent there was any operation on 929.8125 MHz, it would be via part-time shared use of an unaffiliated licensee's transmitters licensed for a different frequency, which part-time "construction" cannot support a grant of exclusivity.

Although PSWF timely served CIC with the 1997 Petition when PSWF filed it, CIC has elected not to file an opposition pleading. CIC has thereby implicitly conceded the accuracy of PSWF's 1997 Petition, which means the Commission should expedite its ruling on this Recon Petition in the interest of justice.

Because PSWF's 1996 Petition and 1997 Petition seek not only denial of CIC's exclusivity but also rescission of CIC authorizations (so that CIC would not even have shared use of the frequency), the Commission must address and rule upon those pleadings in addition to ruling upon this Recon Petition. However, because those pleadings also go to the issue of CIC's eligibility for exclusivity, they are relevant to this Recon Petition.

II. Grant of Nationwide Exclusivity to CIC before Resolution of the 1996 Petition Was Arbitrary and Capricious

The Commission's award of nationwide exclusivity to CIC is not consistent with the Commission's obligations under the APA. Section 555(e) of the APA provides that

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

5 U.S.C. § 555(e). The 1996 Petition alleges conduct by CIC which would render it unqualified for the nationwide exclusivity it sought. Prior to any decision to award CIC nationwide exclusivity, the Commission was statutorily required to release findings of fact and conclusions of law with respect to the matters raised in the 1996 Petition. See Ohio Bell Telephone Co. v. FCC, 949 F.2d 864, 872 (CA6 1991) ("The Commission must articulate a rational connection between the facts found and the choice made."); Community Service, Inc. v. U.S., 418 F.2d 709, 714 (D.C. Cir. 1969) (matter remanded to FCC because of failure of FCC to articulate grounds for its decision). The decision to grant nationwide exclusivity to CIC should be rescinded and the allegations raised in the 1996 Petition addressed on reconsideration.

In addition, it would be arbitrary and capricious of the Commission not to reconsider its award of the nationwide exclusive license to CIC in light of the allegations raised in the 1997 Petition. The 1997 Petition raises questions as to whether or not CIC has actually constructed a sufficient number of transmitters to qualify for nationwide exclusivity, and if CIC had not constructed a sufficient number of transmitter to qualify for nationwide exclusivity by the time the Second R&O was released, then it cannot receive such exclusivity. Second R&O at ¶ 51. The burden is on CIC to prove its eligibility for exclusivity status. The Commission

should rescind CIC's grant of nationwide exclusivity now, pending the result of the investigation which the Commission should commence into the allegations raised in PSWF's 1997 Petition.

CONCLUSION

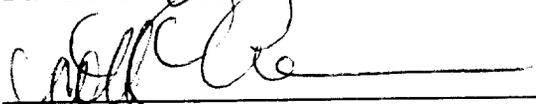
The Commission's award of nationwide exclusivity to CIC without considering the 1996 Petition was arbitrary and capricious, and a violation of Section 555(e) of the APA. The allegations raised in the 1996 Petition were serious, and if CIC is guilty of the allegations raised, then it would not be entitled to many of its underlying authorizations, much less nationwide exclusivity. The allegations in the 1997 Petition are even more serious. Widespread false certification of construction demonstrates a lack of character that would preclude a party from holding any licenses, let alone nationwide exclusivity. The decision to award CIC nationwide exclusivity must be rescinded or set aside now.

Respectfully submitted,

PSWF Corporation



David J. Kaufman



Scott C. Cinnamon

Brown Nietert & Kaufman, Chtd.
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

Their Attorneys

March 26, 1997

STAMP/RETURN
COPY
RECEIVED
APR 26 1996

AMZ
929 MHz
FCC
/K

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

In the Matter of	)	Call Signs
	)	WPGF225-226, WPGF821, WPFQ759
COMMUNICATION INNOVATIONS	)	WPFQ771, WPFQ775, WPFQ795,
CORPORATION	)	WPHC496, WPGT576, WPGP615-616,
	)	WPGT598, WPHB349, WPHB345
)	
	)	and
)	
	)	PCIA Control Nos. 953050029,
	)	953050031, 953410060, 960310338,
	)	953190011, 953190010, 953190008,
	)	960310337, 953190013

To: Wireless Telecommunications Bureau

PETITION FOR DECLARATORY RULING

American Mobilphone, Inc. ("American"), by its counsel and pursuant to Section 1.2 of the Commission's Rules, respectfully requests a declaratory ruling that the above-referenced private carrier paging ("PCP") licenses are void as having been improperly obtained and the above-referenced application defective. Alternatively, American requests a declaratory ruling that the above-referenced licenses and applications cannot be counted in the pending Group B nationwide frequency exclusivity request of Communication Innovations Corporation ("CIC").

Introduction

The Commission's 929-930 MHz PCP Channel Exclusivity Report and Order, 8 FCC Rcd 8318, 74 RR2d 131 (1993) ("R&O"), established rules providing frequency exclusivity, on either a regional or nationwide basis, to qualified PCP applicants and licensees. The R&O also provided that applications on file and licenses granted prior to October 14, 1993, would be considered "grandfathered" or "Group A."

CIC either had been issued licenses or had applications pending for the call signs and locations listed on Exhibit 1 hereto prior to October 14, 1993 (the "Regional Licenses"). CIC requested grandfathered frequency exclusivity for its Regional Licenses and the Commission granted CIC's request on May 27, 1994. See Public Notice, DA 94-546, released May 27, 1994 ("Exclusivity Notice"). The Exclusivity Notice and Section 90.495(c) of the Rules provided that the grant of frequency exclusivity to CIC for its proposed regional system would expire eight months later, on January 27, 1995, unless the qualifying number of the authorized base stations from among those specified in the Regional Licenses were constructed and operating by that date. The Commission's Rules were clear: if an exclusivity grant expired for failure of a licensee to construct a sufficient number of base stations to qualify for regional exclusivity, then the licensee would be prohibited from applying for any new station authorizations in the previously proposed service area for one year from the expiration of exclusivity. 47 C.F.R. §90.495(c).

CIC has admitted to the Commission on several occasions that it did not construct a single base station from among the dozens specified in its Regional Licenses prior to January 27, 1995, the expiration of its exclusivity construction period.¹ Thus, by

¹ See "Informal Opposition to American Mobilphone, Inc. Consolidated Request for Reinstatement of Licenses, Extension of Construction Deadline, Continuance of Regional Exclusivity Designation and Waiver of Section 90.496" filed July 10, 1995, p. p.6; "Informal Reply to American Mobilphone, Inc. Response" filed September 19, 1995 ("Reply"), p.8.

operation of Section 90.495(c), CIC was precluded from filing applications for any new authorizations in the service areas of the Regional Licenses for one year from the expiration of the exclusivity construction period (i.e., January 27, 1996).

As the chart in Exhibit 2 shows, CIC knowingly and deliberately ignored that rule and proceeded to file "new" applications for exactly the same facilities and base station locations specified in its expired Regional Licenses before January 27, 1996 (the "Refiled Applications"). In its Refiled Applications, CIC knowingly concealed the fact that its applications were prohibited by Section 90.495(c), or that CIC had ever received an exclusivity grant for the same geographic area. Because of CIC's concealment, these Refiled Applications were subsequently granted by the Commission, even though they were unacceptable for filing under Section 90.495(c) of the Rules.

American requests a ruling from the Commission declaring that (1) the Refiled Applications were filed in direct violation of Section 90.495(c)(2) of the Rules, and (2) the licenses issued pursuant to certain of those Refiled Applications were improperly obtained and therefore null and void. Alternatively, American requests a ruling from the Commission declaring that the licenses issued based on the Refiled Applications cannot be counted towards CIC's pending Group B nationwide exclusivity request, because they were improperly obtained in contravention of established FCC rules and policies.

I. Section 90.495(c) Requires Rescission ab Initio of the Licenses Granted on CIC's Refiled Applications

The Exclusivity Notice granted the system licensees identified in that Notice "frequency exclusivity on a conditional basis for eight months from the date of the Notice." Upon the expiration of the eight month deadline (*i.e.*, January 27, 1995) each identified system operator was required to "demonstrate to the Commission that they have constructed and are operating a paging system that meets the exclusivity criteria set forth in Section 90.495 of the Commission's Rules." CIC did not construct any of the base stations that were to comprise its proposed grandfathered frequency exclusive regional system. CIC filed no "demonstration" with the Commission. Nor did CIC seek any waiver of the deadline or any extension of time. Thus, CIC's grant of frequency exclusivity for its proposed regional system comprised of its Regional Licenses expired as of January 27, 1995. Because it lost exclusivity for failure to construct, CIC was precluded for filing PCP applications proposing to serve any of the areas its Regional Licenses had proposed to serve for one year after January 27, 1995, *i.e.*, until January 27, 1996. See 47 C.F.R. §90.495(c).

Section 90.495(c) was adopted to further the Commission's goal of preventing spectrum warehousing. Generally, respecting FCC broadcast, CMRS or PMRS licenses, applicants granted exclusive channel assignments must timely construct pursuant to those licenses, because channel exclusivity is a scarce and valuable commodity. If an applicant fails to construct, it forfeits those authorizations and is precluded from filing applications for those

same facilities for a period of time after expiration of the initial authorizations for failure to construct.² Prohibiting PCP licensees who allow their exclusive licenses to expire for non-construction from filing for the same geographic areas where they initially failed to construct is an effective deterrent to spectrum warehousing, but becomes ineffective if the rules are not enforced.

Exhibit 2 shows that CIC not only filed the Refiled Applications before January 27, 1996, but succeeded in receiving at least some license authorizations before that date. CIC claims that the admittedly "expired" Regional Licenses were resuscitated and returned to "current" status when CIC's Refiled Applications were granted by the Commission. Reply at p.4. However, CIC's Refiled Applications should have been dismissed by the Commission pursuant to Section 90.495(c), and would have been dismissed by the Commission but for CIC's willful concealment of material facts from the Commission. Because the Refiled Applications were unacceptable for filing and CIC ineligible to receive those licenses, the licenses must immediately be rescinded.

II. The Licenses Granted on the Refiled Applications Were Obtained by an Abuse of Process and Must Be Rescinded

CIC tendered its Refiled Applications to Personal Communications Industry Association ("PCIA") for frequency coordination prior to January 27, 1996. The Refiled Applications

² See e.g., 47 C.F.R. §73.3519 (prohibition against the filing of repetitious applications in mass media services); 47 C.F.R. §22.121 (prohibition against the filing of repetitious public mobile services applications). 47 C.F.R. §22.947 (five-year market-wide cellular build-out requirement to retain market exclusivity).

mirrored the base station locations and technical parameters set forth in the Regional Licenses. In an effort to circumvent Section 90.495(c) of the Rules, CIC deliberately omitted the fact that it had previously been issued licenses for the facilities specified in the Refiled Applications on an exclusive basis, but had failed to timely construct.

As a result of CIC's deliberate concealment from PCIA and the Commission, new licenses were issued to CIC based on some of the Refiled Applications. Such licenses are the fruit of deliberate concealment, and must be rescinded. Section 312(a) of the Communications Act of 1934, as amended (the "Act") provides that

The Commission may revoke any station license or construction permit (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to Section 308 [or] (2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application.

47 U.S.C. §312(a). The Commission views

misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees.

Character Policy Statement, 59 RR2d 801, 823 (1986).³ Whether misrepresentation (the false statement of fact) or lack of candor

³ This Character Policy Statement was originally written to apply only to broadcast licensees. However, in 1990, the FCC added Section 1.17 to its Rules (47 C.F.R. §1.17), which made its character policy applicable to licensees and applicants in all services. See Modification of Character Policy Statement, 67 RR2d 1107 (1990).

(concealment, evasion and other failures to be fully informative),⁴ Congress did not intend the Commission to treat such conduct lightly. The Commission certainly should not grant authorizations to applicants who misrepresent facts or lack candor before it.

CIC knew that it was prohibited from filing the Refiled Applications. Section 90.495 is the rule section that deals with frequency exclusivity requests, such as the request CIC made for its Regional Licenses. Thus CIC was fully aware of the one-year prohibition against filing applications to provide service in areas where an applicant had a previous authorization expire for failure to construct. For its lack of candor in dealing with the Commission in its applications, the licenses CIC obtained by way of the grant of any of the Refiled Applications must be rescinded.

The fact that licenses have already been issued on some of the Refiled Applications does not save CIC from having them revoked or rescinded now that CIC's lack of candor in filing applications in violation of Commission Rules has come to light. Section 312(a) of the Act allows the Commission to revoke a license based on matters existing prior to the grant of a license, but not known to the Commission until after the grant was made. See, e.g., Theodore E. Sousa, 52 RR2d 758 (1982); Algreg Cellular Engineering, 6 FCC Rcd 2921 (1991).

⁴ See Character Policy Statement at p.813.

III. A Declaratory Ruling Must Issue Precluding CIC from Using Licenses Issued on the Refiled Applications towards Meeting Its Group B Nationwide Exclusivity Quota

To request nationwide frequency exclusivity, an applicant must have authorizations and/or applications for 300 or more transmitters and must provide service to at least 50 markets, including 25 of the top 50 markets and two in each of seven different geographic regions. 47 C.F.R. §90.495(a)(2). CIC forwarded its request for nationwide frequency exclusivity to PCIA on January 28, 1994. In order to satisfy the requirement for Group B nationwide frequency exclusivity, CIC included all of the licenses that comprised its unconstructed Group A grandfathered regional exclusive system. If the Commission determines that it cannot rescind its grant of the Refiled Applications, then at the very least a declaratory ruling must issue which precludes CIC from counting the Refiled Applications (or licenses based thereon) towards the transmitter requirement for nationwide exclusivity set forth in Section 90.495(a)(2). The Commission should not allow CIC to benefit from its own abuse of the Commission's Rules, and its lack of candor before the Commission.

IV. Conclusion

CIC's Refiled Applications were unacceptable for filing when tendered to the Commission by CIC. CIC improperly obtained authorizations on some of its Refiled Applications by deliberately failing to disclose to the Commission that it had refiled in less than one year from expiration of a prior frequently exclusivity grant.

Any licenses issued to CIC based on the Refiled Applications should be immediately rescinded, because the applications were unacceptable for filing when tendered and but for CIC's lack of candor, those licenses would never have been issued. If the Commission decides not to rescind the licenses, then a declaratory ruling should issue precluding CIC from counting the Refiled Applications (or any licenses based thereon) towards CIC's Group-B nationwide exclusivity quota.

Respectfully submitted,

AMERICAN MOBILPHONE, INC.



David J. Kaufman



Scott C. Cinnamon
Its Attorneys

BROWN NIETERT & KAUFMAN, CHARTERED
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

April 26, 1996

SCC\AMI.PET\mlc

<u>Location</u>	<u>Call Sign</u>	<u>Grant Date</u>
Jupiter, FL	WPDD211	9/20/93
Orlando, FL	WPDD861	9/21/93
Memphis, TN	WPDF999	9/27/93
Columbus, OH	WPDF975	10/1/93
Pittsburgh, PA	WPDI964	10/14/93
Charlotte, NC/Columbia, SC	WNZZ817	10/27/93
Jacksonville, FL	WPCR444	10/28/93
Philadelphia, PA	WPDI989	11/2/93
Medina, OH	WPDV201	12/1/93
Miami, FL	WPDV807	12/9/93
Raleigh-Durham, NC	WPDF635	12/17/93
Louisville/Lexington, KY	WPDU553	1/24/94
Buffalo/Syracuse, NY	WPCR397	2/8/94
Atlanta, GA	WPED592	2/22/94

AMI.XLS

Exhibit 2

<u>Location</u>	<u>Original Call Sign</u>	<u>Grant Date</u>	<u>New Call Sign For Same Locations</u>	<u>Grant Date</u>	<u>PCIA Control No.</u>	<u>Date filed with FCC</u>
	Group A Regional Exclusive Licenses		Based upon impermissible Refiled Applications		Pending Applications also prematurely filed	
Jupiter, FL	WPDD211	9/20/93	WPGF225	1/24/95	953050029	11/11/95
Orlando, FL	WPDD861	9/21/93	WPGF226	1/24/95	953050031	10/10/95
Memphis, TN	WPDF999	9/27/93	WPGF821	1/25/95	953410060	1/18/96
Columbus, OH	WPDF975	10/1/93	WPFQ759	2/23/95		
Pittsburgh, PA	WPDI964	10/14/93	WPFQ771	2/23/95	953190011	12/6/95
Charlotte, NC/Columbia, SC	WNZZ817	10/27/93	WPFQ775	2/23/95	953190010	12/6/95
Jacksonville, FL	WPCR444	10/28/93	WPFQ795	2/28/95	953190008	12/5/95
Philadelphia, PA	WPD1989	11/2/93	WPGT576	3/21/95		
Medina, OH	WPDV201	12/1/93	WPHC496	5/8/95		
Miami, FL	WPDV807	12/9/93	WPGP616	2/21/95	960310337	2/3/96
Raleigh/Durham, NC	WPDS635	12/17/93	WPGT598	3/23/95		
Louisville/Lexington, KY	WPDU553	1/24/94	WPGP615	2/21/95	953190013	12/5/95
Buffalo/Syracuse, NY	WPCR397	2/8/94	WPHB349	5/3/95		
Atlanta, GA	WPED592	2/22/94	WPHB345	4/26/95		

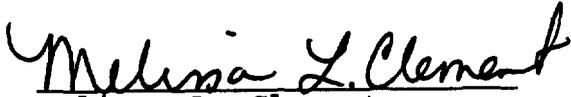
CERTIFICATE OF SERVICE

I, Melissa L. Clement, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "**Petition for Declaratory Ruling**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 26th day of April, 1996 to each of the following:

Michele Farquhar*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, DC 20554

Ralph A. Haller, Deputy Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 5002
Washington, DC 20554

Richard O. Pullen
Vice President and General Counsel
Communication Innovations Corporation
4001 N. 9th Street
Suite 1001
Arlington, VA 22203-1963


Melissa L. Clement
Melissa L. Clement

* - Via Hand Delivery

STAMP/RETURN
COPY

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

In the Matter of)
)
COMMUNICATION INNOVATIONS CORPORATION)
)
Notice of Construction and Operation)
Respecting Various Paging)
Authorizations on 929.8125 MHz)

RECEIVED

MAR 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Wireless Telecommunications Bureau

PETITION FOR DECLARATORY RULING THAT THE 929 MHz
PRIVATE CARRIER PAGING LICENSES OF
COMMUNICATION INNOVATIONS CORPORATION HAVE EXPIRED

David J. Kaufman
Scott C. Cinnamon
Brown Nietert & Kaufman, Chtd.
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

March 11, 1997

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
I. Standing	2
II. CIC Construction Claims	2
III. PSWF's Investigation of CIC's Alleged Construction	3
IV. CIC's "Piggy-Backing" on PageMart's or Someone Else's Transmitters at the South Florida Sites Does Not Constitute "Construction" Under FCC Rules	6
V. There is Sufficient Evidence to Require the Commission to Investigate Whether the Remainder of CIC's Authorizations Should Be Cancelled for Failure to Construct	8
VI. If CIC's Authorizations Are Not Cancelled by Operation of Section 90.495 of the Rules, Then a Hearing on the Validity of the Construction of the Authorizations Must Be Held	10
VII. In Any Event, The Authorizations Should Not Count Towards CIC's Exclusivity Eligibility	10
CONCLUSION	11

Summary

Communication Innovations Corporation ("CIC") represented to the Commission in a letter dated July 30, 1996 that it had completed construction of 334 transmitter sites at 929.8125 MHz and that such construction met the criteria for grant of nationwide exclusivity on that Private Carrier Paging ("PCP") frequency. Seven days earlier, CIC filed a construction certification letter with the Commission claiming that it had constructed 280 of those sites in the eleven days between July 11, 1996 and July 22, 1996. Interestingly, all of the construction notifications filed with the Commission requested modification of the underlying licenses to specify new sites for construction (i.e., none of the transmitters were constructed at sites CIC had applied for).

PSWF has co-channel authorizations and regional exclusivity on 929.8125 MHz. PSWF decided to spot check CIC's claims of construction, and hired technical consultants to monitor locations in South Florida and Chicago where CIC claimed to have constructed.

The consultants monitored the frequency 929.8125 MHz at the locations CIC specified in its construction certifications. In South Florida only sporadic transmissions were received, so sporadic that CIC's call sign information was not even broadcast, in violation of the Commission's Rules. In Chicago, no transmissions were monitored at all. None of the site managers contacted by the consultants had a record of a lease with CIC or other similarly named company and none of the site managers had tenants authorized to operate on 929.8125 MHz.

PSWF submits that CIC did not construct at the locations in Chicago and South Florida as it represented to the Commission, and the licenses for those sites should be cancelled or revoked immediately. At the very least those authorizations should be designated for hearing to determine whether or not timely construction in compliance with the Commission's Rules has occurred at the sites specified in those authorizations. In any event, these authorizations should not be counted towards CIC's eligibility for nationwide exclusivity.

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

In the Matter of)
)
COMMUNICATION INNOVATIONS CORPORATION)
)
)
Notice of Construction and Operation)
Respecting Various Paging)
Authorizations on 929.8125 MHz)

To: Wireless Telecommunications Bureau

**PETITION FOR DECLARATORY RULING THAT THE 929 MHz
PRIVATE CARRIER PAGING LICENSES OF
COMMUNICATION INNOVATIONS CORPORATION HAVE EXPIRED**

PSWF Corporation ("PSWF"), by its counsel and pursuant to Section 1.2 of the Commission's Rules, respectfully requests a declaratory ruling that the 929 MHz private carrier paging ("PCP") authorizations held by Communication Innovations Corporation ("CIC") identified by the call signs listed on Exhibit A hereto (the "Authorizations") have expired because construction was not accomplished within twelve months of the grant of the Authorizations as required by Section 90.167 of the Rules. Alternatively, PSWF requests that the Commission designate the Authorizations for a hearing to determine whether they have automatically cancelled or should be revoked. Alternatively to that, PSWF requests that the Commission declare that the Authorizations may not be counted in assessing CIC's eligibility for local, regional or nationwide exclusivity and rescind the grant of nationwide exclusivity recently given to CIC.¹

¹ See Second Report and Order and Further Notice of
(continued...)

I. Standing.

PSWF is the assignee of American Mobilphone, Inc. ("AMI").² AMI was an active member of the paging industry for many years, having served ten of thousands of paging customers in Alabama, Georgia, Florida, West Virginia, Kentucky and Ohio in the 152 MHz, 454 MHz and 464 MHz bands. AMI/PSWF have served paging customers for more than fifteen years.

PSWF holds sufficient authorizations to qualify for regional frequency exclusivity on 929.8125 MHz. PSWF has been awarded regional exclusivity and is currently planning to construct its system. PSWF has standing to file this Petition because CIC is claiming nationwide exclusivity on the same 929.8125 MHz frequency.

II. CIC Construction Claims.

On July 30, 1996, CIC filed a letter with the Chief of the FCC's Land Mobile Branch (the "July 1996 Letter") reporting that CIC had completed construction of 334 transmitter sites authorized under the call signs identified in the attachment to its letter. (Copy of July 1996 Letter attached as Exhibit B for convenience.) All of the 334 sites were constructed at 929.8125 MHz, and according to CIC, its construction of these sites met the criteria for grant of nationwide frequency exclusivity on 929.8125 MHz to CIC.

¹(...continued)

Proposed Rulemaking, FCC 97-59, released February 24, 1997.

² The *pro forma* assignment of all of AMI's assets, including its FCC authorizations, was approved by the Commission and consummated as of December 31, 1996.