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Federal Communications Commission
Office of Secretary

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

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

PETITION FOR PARTIAL RECONSIDERATION

PSWF Corporation ("PSWF"), by its counsel and pursuant to Section 1.429 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").[1] Specifically, PSWF requests reconsideration of the Commission's retroactive elimination of Section 90.496 of the Commission's Rules concerning the availability of an extended implementation schedule to those qualified regional or nationwide exclusive licensees with pending extended implementation requests.

Introduction

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

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[1] Section 1.429 is the appropriate rule insofar as PSWF seeks reconsideration of the retroactive elimination of Section 90.496 and its extended implementation concept. This Recon Petition is timely filed within thirty days of the March 12, 1997 publication of the Second R&O in the Federal Register. *See* 62 Fed Reg 11616.

[2] The *pro forma* assignment of all of AMI's assets, including its FCC authorizations, was approved by the Commission (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 462 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. PSWF filed a request for extended implementation pursuant to Section 90.496 ("EIS Request") which EIS Request remains pending.[3] It had intended to take advantage of the extended implementation schedule which the Commission made available to entities that qualified for regional or nationwide exclusivity in the 929-930 MHz PCP Channel Exclusivity Report and Order, 8 FCC Rcd 8318, 74 RR2d 131 (1993) ("R&O"). In the Second R&O, the Commission eliminated the availability of extended implementation schedules by deleting Section 90.496 of the Commission's Rules without explanation, even as to those, such as PSWF, with pending extended implementation

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[2](...continued)
and consummated as of December 31, 1996.

[3] PSWF also holds certain grandfathered regional exclusive authorizations on 929.8125 MHz. PSWF had challenged the Commission's earlier decision to deny extended implementation to grandfathered licensees. *See* 929-930 MHz Report and Order, 8 FCC Rcd 8318 (1993), *recon. den.*, 929-930 MHz Memorandum Opinion and Order, 11 FCC Rcd 3091 (1996). The Court of Appeals recently affirmed the Commission's decision to deny extended implementation to grandfathered licensees, agreeing with the Commission's arguments that PSWF could have sought non-grandfathered authorizations and received extended implementation. PSWF Corporation v. FCC, No. 96-1097, slip op. at p.7 (D.C. Cir., decided March 7, 1997). PSWF did what the Commission suggested to the Court that PSWF should do and now, by its Second R&O, the Commission is denying relief to PSWF anyway!

requests. PSWF believes that licensees who both qualified for non-grandfathered exclusivity and had requests for extended implementation pending prior to the release of the Second R&O should be entitled to take advantage of the extended implementation rule. That is especially so where, as here, the Commission had represented to the Court of Appeals that extended implementation would be made available to PSWF and similarly-situated non-grandfathered licensees.

I. Due Process Requires That Pending Extended Implementation Requests Be Processed.

A 929 MHz PCP station must be placed into operation within one year of the grant date. See 47 C.F.R. §90.631(f). In the R&O, the Commission adopted Section 90.496, which allows an extension of that construction deadline for applications filed after October 14, 1993 where the proposed station is part of a regional or nationwide system comprised of more than 30 transmitters. 74 RR2d at 136-37.

To request an extended implementation schedule, a requestor was required to state the reasons why an extended schedule was necessary, provide a construction timetable with milestones and a construction cost estimate. In addition, a requestor was required to certify that, within thirty days of the grant of its request for extended implementation schedule, it would place a sum of money equal to the construction estimate in escrow or obtain a bond equal to $20,000 for each proposed transmitter in its regional or nationwide exclusive system. 47 C.F.R. §90.496. Requestors proposing regional or nationwide systems comprised of thirty or

more stations were allowed to request a construction period of as long as three years. Id.

The Commission's Notice of Proposed Rulemaking, 11 FCC Rcd 3108 (1996) ("Notice"), nowhere proposed deletion of Section 90.496, and in fact the Commission represented to the Court of Appeals that if PSWF had filed for non-grandfathered licenses after its one-year waiting period, PSWF would be eligible for extended implementation. In its brief to the Court of Appeals in PSWF Corp., *supra*, the Commission said

> In any event, if all that American Mobilphone seeks is the opportunity to file an application for a license with an extended build-out period, it had adequate opportunity to do so after October 14, 1993.[4]

PSWF has spent substantial time and money on business planning, engineering design, application preparation fees, legal fees, frequency coordination expenses and FCC filing fees in order to develop a plan for a viable regional system and obtain the authorizations for a sufficient number of transmitter sites to qualify for non-grandfathered frequency exclusivity. PSWF took these steps as a safeguard against the chance that the Court of Appeals might (as it later did) uphold the Commission's denial of extended implementation eligibility to PSWF's grandfathered authorizations, and that the Commission might rule that PSWF's efforts to obtain reconsideration respecting grandfathered exclusivity might not have tolled the running of its original

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[4] *See* Brief for Respondent at 20, PSWF Corp., *supra*.

any of the Commission's prior soundings in this docket. The Commission was required to provide notice "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." Florida Power and Light Co. v. U.S., 846 F.2d 765, 771 (D.C. Cir. 1988). In the instant proceeding, the first inkling affected parties received concerning the possibility of the elimination of Section 90.496 came when the Second R&O was released, and the rule was deleted.

The deletion of the rule cannot be viewed as a "logical outgrowth" from anything the Commission proposed previously. *Compare* Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996) (Final rule held to be a logical outgrowth of proposed rule as framed in the notice and FCC acted within its authority to modify proposal.) The rule was eliminated, retroactively so as to foreclose even pending requests, without prior notice and without any explanation in the Second R&O or the Notice that preceded it. The complete absence of any discussion of the elimination of the rule renders the action a clear violation of Section 553 of the APA. *See* MCI Telecommunications Corp. v. FCC, 57 F.3d 1136 (D.C. Cir. 1995) (Reference to proposal in footnote of proposed rule making not adequate notice to satisfy APA.)

III. The Commission's Decision to Retroactively Eliminate Section 90.496 Was Arbitrary and Capricious.

The Commission provided no rational basis for its decision. Licensees such as PSWF relied on the extended implementation rule. Without warning and without explanation the Commission shifted its

construction deadlines.[5] For the Commission to summarily dismiss the pending requests for extended implementation is a violation of the due process rights of those applicants, and in PSWF's case also at odds with the Commission's successful litigating position before the Court of Appeals. *See* Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994).

II. Retroactive Elimination of Section 90.496 of the Rules without Notice and Comment Was in Violation of the Administrative Procedure Act.

The Commission disregarded its obligations under the Administrative Procedure Act ("APA") by retroactively eliminating Section 90.496 of the Rules with respect to pending requests for extended implementation without the opportunity for notice and comment. Section 553 of the APA requires the Commission to provide notice of proposed rules and rule changes, and allow interested persons the opportunity to comment on the proposed changes. 5 U.S.C. §553.

The Commission's decision in the Second R&O to delete the extended implementation rule came without notice of such action in

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[5] In PSWF Corp., *supra*, the Court indicated its own understanding that the Commission had conceded that the construction deadlines for PSWF's grandfathered licenses had been tolled since the December 23, 1993 filing of PSWF's first petition for reconsideration, but when PSWF wrote to the Commission in March, 1997 seeking confirmation of its grandfathered license construction deadlines, the Commission declined to respond. So far as PSWF can tell, the Commission is now taking the position that no construction deadlines were tolled, that PSWF has no authorizations except its non-grandfathered authorizations, and that PSWF cannot receive extended implementation even for those because the Commission rescinded the rule before acting on PSWF's request.

course 180 degrees and eliminated the rule, leaving licensees that qualified for extended implementation but whose requests were pending as of the release date of the Second R&O in a precarious predicament. Such a change in direction without any explanation is arbitrary and capricious under 5 U.S.C. §706(2)(A). *See* Mobile Communications Corporation of America v. FCC, 77 F.3d 1399, 1407 (D.C. Cir. 1996) (Sudden reversal of course without explanation in imposing payment requirement on licensee that was on several occasions assured of "pioneers preference" license without need for payment was not reasoned decision making and issue was remanded for further consideration). The Commission should reverse its retroactive elimination of the rule on reconsideration and grant all pending requests for extended implementation schedules, including PSWF's.

CONCLUSION

The Commission's decision to retroactively eliminate Section 90.496 of its rules violated the due process rights of PSWF and similarly-situated parties who qualified for non-grandfathered exclusivity and had requests for extended implementation pending when the Second R&O was released. The Commission retroactively deleted the rule without providing affected parties any notice or opportunity to comment, in violation of the APA. Elimination of Section 90.496 represented a complete reversal of established rule and policy and the action was taken without any reasoned explanation, rendering the action arbitrary and capricious under

the standards set forth in the APA (5 U.S.C. § 706). For all of these reasons, the Commission must reconsider its action, and process pending extended implementation requests under Section 90.496. The Commission should change its deletion of that section to preclude the filing of new requests, but not the grant of previously-pending requests.

Respectfully submitted,

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April 11, 1997

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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 Partial Reconsideration**" to be sent via first class U.S. mail, postage prepaid or hand delivered, this 11th day of April, 1997 to each of the following:

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