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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
	)	
Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding	)	PP Docket No. 93-253

MEMORANDUM OPINION AND ORDER

Adopted: November 12, 1997 **Released: November 12, 1997**

By the Chief, Wireless Telecommunications Bureau:

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I. INTRODUCTION

1. In this order, we address petitions for reconsideration of our May 20, 1997, *Extended Implementation Order* establishing termination dates for extended implementation (EI) authority previously granted to 37 incumbent licensees in the 800 MHz Specialized Mobile Radio (SMR) service.[1] In the *Extended Implementation Order*, we determined that 29 of these incumbents had successfully rejustified their extended implementation plans, and granted these incumbents two years to complete the buildout of their systems under their existing EI authorizations. In the case of the remaining eight incumbents, we determined that the rejustification showing was insufficient to warrant a two-year period, and determined that their EI authority would expire six months from the date of the order, *i.e.*, November 20, 1997. Six parties have petitioned for reconsideration of the *Extended Implementation Order*.[2]

2. In this order, we generally affirm the determinations made in the *Extended Implementation Order*, but we reconsider our decisions with respect to four petitioners. Specifically, we reverse our prior decision to terminate Telecellular's EI authority after six months, and grant Telecellular two years from the date of the *Extended Implementation Order* to complete construction. We also will grant CTM, CellCall, and Entergy two years from the date of the *Extended Implementation Order* to complete construction of their systems. However, we deny the petitions of Atlantic and the Roberts Licensees.

II. BACKGROUND

3. Extended Implementation Grants. Prior to December 1995, when the Commission amended its 800 MHz SMR rules to provide for geographic area licensing,[3] 800 MHz SMR

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[1] Amendment of Part 90 of the Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Order*, DA 97-1059 (May 20, 1997) (*Extended Implementation Order*).

[2] This order addresses the following Petitions for Reconsideration: Atlantic Cellular Company, Inc. (Atlantic); CellCall, Inc. (CellCall); Centennial Telecommunications Midwest, Inc. (CTM); Entergy Services, Inc. (Entergy); Licensees represented by K. Steven Roberts (Roberts Licensees); and Telecellular. The Roberts Licensees also filed two petitions to toll the EI deadline during the pendency of its reconsideration petition. Because the Roberts Licensees' petitions raise identical arguments, we will address them jointly.

In addition to the above petitioners, Pittencrieff Communications has filed a petition requesting clarification as to which of its licenses were covered by the *Extended Implementation Order*. We will respond to Pittencrieff's request separately by letter.

Finally, Southern Company, Inc. filed an Application for Review before the Commission seeking review of the *Extended Implementation Order*. The Application for Review will be addressed in a separate proceeding. *See* 47 C.F.R. § 1.115.

[3] Amendment of Part 90 of the Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995) (*800 MHz SMR First R&O*).

licenses were awarded on a site-by-site, channel-by-channel basis. Licensees of conventional SMR systems were required to construct and operate their systems within eight months, while licensees of trunked systems had one year to construct and commence operation.[4] In the late 1980's, however, SMR operators seeking to develop digital systems that would cover wide areas and offer increased capacity through spectrum reuse began to seek waivers of these construction requirements that would allow them up to five years to construct such systems. Initially, the Commission granted multi-year extended implementation periods to several SMR licensees by waiver when the licensees could demonstrate unique circumstances and no reasonable alternative within existing rules by showing that their proposed systems differed sufficiently from a conventional system to make normal construction standards inapplicable.[5] In 1993, the Commission amended Section 90.629 of the rules to allow SMR applicants to request up to five years to construct systems that required extended implementation because of wide-area coverage, size, or complexity.[6] Pursuant to both the waiver process and Section 90.629, numerous SMR licensees obtained EI authority prior to the Commission's adoption of geographic area licensing rules.

4. *800 MHz SMR First R&O*. In December 1995, the Commission adopted new geographic area licensing and auction rules for 800 MHz SMR service in the *800 MHz SMR First R&O*. These rules provided for licensing of the upper 200 channels of SMR spectrum in three contiguous blocks, using the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas (EAs) as the licensing areas.[7] As part of the conversion to geographic area licensing, the Commission evaluated the effect on available spectrum of previous EI grants that had been made pursuant to waiver and Section 90.629. The Commission observed that while extended implementation may have facilitated the development of wide-area SMR systems generally, some extended implementation licensees had accomplished little or no construction.[8] Expressing concern that both existing and future grants of extended implementation authority "would be contrary to the goals of this proceeding," the Commission suspended acceptance of

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[4] *See* 47 C.F.R. §§ 90.633 and 90.629(a)(1).

[5] *See, e.g., American Mobile Data Communications, Inc.*, 4 FCC Rcd 3802 (1989), at 3805; *Fleet Call, Inc.*, 6 FCC Rcd 1533 (1991); *recon. dismissed*, 6 FCC Rcd 6989 (1991), at 1536. *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest).

[6] Amendment of Part 90 of the Commission's Rules Governing Extended Implementation Periods, PR Docket No. 92-210, *Report and Order*, 8 FCC Rcd 3975 (1993).

[7] The Department of Commerce Bureau of Economic Analysis has established 172 EAs which cover the continental United States. *See* "Final Redefinition of the BEA Economic Areas," 60 Fed. Reg. 31,114 (Mar. 10, 1995).

[8] *800 MHz SMR First R&O* at 1526.

new requests for EI authority by 800 MHz SMR operators,[9] and also required operators who had received EI grants previously to rejustify the continued need for extended time to construct their facilities.

5. Specifically, the Commission required all incumbent 800 SMR licensees who had received EI authority "to demonstrate that allowing them extended time to construct their facilities is warranted and furthers the public interest."[10] As part of this demonstration, the Commission required licensees to demonstrate that their EI authority was not being used in a manner that resulted in the ineffective use of spectrum or that would prevent the rapid construction of wide-area systems.[11] The Commission also stated that EI authority should not be used to obstruct the future construction plans of EA licensees.[12] In addition, the Commission required SMR incumbents seeking to rejustify their EI grants to submit detailed information regarding their systems.[13] In its rejustification showing, each licensee was required to: "(a) indicate the duration of its extended implementation period (including commencement and termination date); (b) provide a copy of its implementation plan, as originally submitted and approved by the Commission, and any Commission-approved modifications thereto; (c) demonstrate its compliance with Section 90.629 of our rules if authority was granted pursuant to that provision, including confirmation that it has filed annual certifications regarding fulfillment of its implementation plan; and (d) certify that all facilities covered by the extended implementation authority proposed to be constructed as of the adoption date of this *First Report and Order* are fully constructed and that service to subscribers has commenced as defined in the *CMRS Third Report and Order.*"[14]

6. The Commission delegated authority to the Wireless Telecommunications Bureau (Bureau) to review and take appropriate action on EI rejustification showings.[15] Pursuant to this delegation, upon the approval of a licensee's EI rejustification showing, the licensee would

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[9] *Id.*

[10] *Id.*

[11] *800 MHz First R&O* at 1524.

[12] *Id.* at 1524-1525.

[13] *Id.*

[14] *800 MHz SMR First R&O* at 1525 (footnote omitted). *See also* 47 C.F.R. § 90.629. The *CMRS Third Report and Order* defines commencement of service to mean provision of service to at least one party unaffiliated with, controlled by, or related the providing carrier. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Third Report and Order*, 9 FCC Rcd 7988, ¶ 178 (1994).

[15] *800 MHz SMR First R&O* at 1525.

receive a construction period of two years or the remainder of its current EI period, whichever was shorter.[16] Those licensees that failed to rejustify their previous EI grant would have six months to construct the remaining facilities covered under their implementation plan.[17]

7. *Extended Implementation Proceeding*. On June 4, 1996, the Bureau released a Public Notice setting forth the information to be provided by incumbent 800 MHz SMR licensees seeking to retain extended implementation authority and ordered that such showings be filed by June 17, 1996.[18] In the notice the Bureau first noted that the *800 MHz SMR First R&O* required licensees to demonstrate that extended implementation was warranted and in the public interest, and then restated the specific submission requirements listed in the *800 MHz SMR First R&O*. In addition, responding to inquiries by licensees regarding the content and format of these showings, the Bureau recommended a format that licensees could use to submit their rejustifications and supporting exhibits.[19] In so doing, the Bureau did not adopt new standards for reviewing EI rejustifications, as some petitioners contend, but merely provided a framework that incumbents could use to present their rejustifications to facilitate the Bureau's review.

8. Twenty-seven licensees who submitted rejustification showings were licensees of existing analog SMR systems at the time they initially requested EI authority. These licensees sought EI authority for the purpose of converting their existing analog systems into digital

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[16] *Id.*

[17] *Id.* at 1526.

[18] *See* Recommended Filing Format for 800 MHz SMR Licensees Rejustifying Need for Extended Implementation Authority, *Public Notice*, 11 FCC Rcd 6579 (1996) (*Rejustification Public Notice*). The Commission stated that rejustification showings were to be filed within 90 days of the effective date of the *800 MHz SMR First R&O*. The order was published in the Federal Register on February 16, 1996, causing the rules to become effective on March 18, 1996. Therefore, the Bureau initially provided for filing of rejustification showings 90 days after the effective date, or June 17, 1996. *See* 47 C.F.R. § 90.629(e); *see also* 47 C.F.R. § 1.4(j).

[19] The Bureau stated: "By this Public Notice, we recommend that licensees submit their showings in letter or pleading from, with additional information provided in exhibits as described below.... In their submissions, licensees should include a general overview of the original extended implementation request or waiver filing. Such a description should include the geographic area covered by the system, the number of base stations in the system, and the date extended implementation authority will expire. Licensees may also wish to include information regarding the type of technology being used, the type of services being provided, the number of subscribers currently on the system, the size of the market covered by the licensee's system, etc. The submission should also include: (1) a description of the development plan for the build-out of the system; and (2) a description of what portion of the system has been constructed and what remains to be constructed. Finally, the licensee should state whether the full construction period or two years is required (footnote omitted). If the licensee states that it needs its full construction period or two years, the licensee should provide justification for such a request." *Rejustification Public Notice* at 6580.

systems.[20] Based on our review of their rejustification submissions, we found that most of these licensees had undertaken significant construction of new digital systems and some had commenced digital operation.[21] In addition, we determined that because these licensees were previously utilizing most or all of their licensed SMR channels in analog mode, granting them additional time to complete the construction of wide-area SMR systems would not significantly affect the availability of spectrum for geographic area licensing.[22] Thus, through their ongoing provision of service combined with digital buildout, these analog licenses demonstrated that they were using their allocated spectrum efficiently.[23] We thus concluded that all of the licensees in this category had, under the standard set forth in the *800 MHz SMR First R&O*, justified continuation of their EI authority.[24]

9. Ten of the licensees who filed for continuation of EI authority had originally sought to construct new digital SMR systems, rather than to convert existing analog facilities.[25] In the *Extended Implementation Order*, we determined that only two of these licensees, Hawaii Wireless and New England Wireless, had met the rejustification criteria for continuation of their EI authority until May 20, 1999.[26] The remaining licensees -- Atlantic, CTM, DRLP, Hansen, Roberts Licensees, SRI, and Telecellular -- had no existing facilities and had failed to commence construction of new facilities. Although in some instances the lack of construction was consistent with the benchmarks laid out in their original EI authorizations, we determined that it would be inconsistent with the goals of the *800 MHz SMR First R&O* to approve EI plans that required

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[20] *Extended Implementation Order*, ¶ 9. The following licensees were part of this category: Advanced MobileComm of Texas L.P.; Bayou Communications, Inc.; Bis-Man Mobile Phone, Inc.; CellCall; Davis Electronics Company, Inc.; DCL Associates, Inc. (DCL); Entergy; Industrial Communications & Electronics, Inc.; Mobex Idaho, Inc.; Mobex North Carolina, Inc.; Mobile Relays, Inc.; Motorola and Castle Tower Corp.; Nextel Communications, Inc. (Nextel); Norcal Wireless; Palmer Communications d/b/a Illowa Communications; Parkinson Electronics (Parkinson); Pittencrieff Communications, Inc.; Potomac Corporation; Radiophones JV; Racom Corp. (Racom); RAM Technologies, Inc.; Speed Net; Southern Co.; Southwest Wireless, Inc.; Western Wireless; and William Miller d/b/a Russ Miller Rentals Co.

[21] *Id.* We noted that, in particular, DCL, Entergy, Nextel, Parkinson, Racom, and Southern have constructed significant portions of their digital systems.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*, ¶ 11. The licensees are Atlantic; CTM; Digital Radio, L.P. (DRLP); Charles Hansen (Hansen); Hawaiian Wireless, Inc.; New England Wireless; Roberts Licensees; Spectrum Resources, Inc. and Spectrum Resources of the Northeast, Inc. (jointly, "SRI"); and Telecellular.

[26] *Id.*

little or no construction.[27] We also concluded that it would be more efficient to reassign this spectrum through the EA auction process to licensees that have demonstrated by bidding that they would use the spectrum efficiently to the benefit of the public.[28] Therefore, we concluded that these six incumbent licensees would be limited to six months from the release date of the *Extended Implementation Order*, or until November 20, 1997, to complete construction of currently authorized facilities.[29]

III. DISCUSSION

A. Atlantic

10. Background. In the *Extended Implementation Order*, we found that Atlantic did not adequately justify the delay in implementation of its wide-area SMR system. Atlantic pointed to technical and regulatory uncertainties as the reasons for its failure to initiate construction, and contended that it had not been fiscally or technically appropriate to proceed with full implementation of its wide-area SMR system. We determined that Atlantic had not cited any unique circumstance that prevented it from initiating construction. We noted that other SMR licensees constructed wide-area facilities despite the presence of the same alleged technical and regulatory uncertainties cited by Atlantic. We therefore denied Atlantic's rejustification request and required it to complete construction within six months.[30]

11. Petition. Atlantic maintains that it is entitled to the full two-year extended implementation period because: (1) the Bureau failed to provide notice of the standards it would use to review EI rejustification requests;[31] (2) Atlantic was in compliance with the benchmarks of its original extended implementation plan;[32] (3) Atlantic was unable to commence construction because of regulatory uncertainty regarding the "upper 200" SMR frequencies during the time period considered in the *Extended Implementation Order*;[33] (4) digital technology sought by Atlantic was unavailable;[34] and (5) participation in the 800 MHz auction after loss of EI authority

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[27] *Id.*, ¶ 12.

[28] *Id.*

[29] *Id.*

[30] *Id.*, ¶ 14.

[31] Atlantic Petition at 8-10.

[32] *Id.* at 7.

[33] *Id.* at 10-12.

[34] *Id.*

would not make Atlantic whole because it would be unable to acquire EA licenses for more than 50 percent of the spectrum it previously held under its EI grant.[35]

12. Discussion. We reject Atlantic's contention that licensees had no notice of the standards that would be used to review EI rejustification requests. The Commission set forth specific criteria for such review in the *800 MHz SMR First R&O*. In that order, the Commission required licensees to demonstrate that their EI authority was not being used in a manner that resulted in the ineffective use of spectrum or that would prevent the rapid construction of wide-area systems.[36] The Commission also stated that EI authority should not be used to obstruct the future construction plans of EA licensees.[37] The Commission delegated authority to the Bureau to review EI rejustifications and to determine whether these rejustifications met the Commission's criteria.[38] Pursuant to this delegated authority, the Bureau issued a Public Notice describing in detail the information it needed from licensees to evaluate their requests, as discussed above in paragraph 7.[39] We conclude that these steps provided Atlantic and other SMR licensees seeking rejustification of EI authority with ample notice of the criteria that would be used to review their requests.

13. We also reject Atlantic's contention that the Bureau should have granted Atlantic's rejustification request so long as it demonstrated that it had so far satisfied its original five-year implementation benchmarks. This argument ignores the fact that in the *800 MHz First R&O*, the Commission concluded that the terms of existing five-year EI authorizations should be shortened because the timetables provided for in such authorizations potentially conflicted with the Commission's goal of discouraging ineffective spectrum use and encouraging prompt construction of wide-area systems through EA licensing.[40] Moreover, while the Commission did require EI licensees to submit information regarding compliance with prior EI benchmarks, nowhere did it indicate or even suggest that demonstrating such compliance in and of itself would lead to an automatic approval of a rejustification request. To the contrary, the Commission stated that incumbents must demonstrate that allowing extended time to construct is "warranted and furthers the public interest."[41] Thus, while a licensee's compliance with its original benchmarks was a relevant consideration, the Commission did not indicate that it intended such compliance to be

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[35] *Id.* at 17-18.

[36] *800 MHz First R&O* at 1524.

[37] *Id.* at 1524-1525.

[38] *Id.* at 1525.

[39] *See Rejustification Public Notice*, 11 FCC Rcd at 6579-6581.

[40] *800 MHz SMR First R&O* at 1525.

[41] *Id.*

dispositive of whether a licensee would be entitled to the maximum period for completing its EI buildout. In some instances, licensees' implementation schedules required only minimal construction -- or no construction -- in the first several years of the buildout period. In such instances, the Commission contemplated that a licensee's EI term could be reduced in the absence of other evidence that the licensee was using its spectrum efficiently.[42] Indeed, had that not been the Commission's intent, the rejustification process would have been superfluous, for the Commission's rules already allowed for shortening the EI period where a licensee had failed to meet its benchmarks.[43]

14. We also disagree with Atlantic's contention that its failure to initiate construction was justified by regulatory uncertainty or lack of digital technology. As demonstrated by the example of other licensees who chose to commence construction under the same regulatory climate, and with the same technology options, the decision whether or not to take certain business risks is within a licensee's control. In light of Atlantic's failure to present any unique circumstances, we find that Atlantic's failure to begin construction was within its control.

15. Finally, we reject Atlantic's claim that the purported ability or inability to acquire spectrum in the 800 MHz auction is relevant to the issue of whether it should receive the full two-year extended implementation period for spectrum previously licensed to it. The issue before us is the extent to which Atlantic should be allowed to retain spectrum prior to the auction. This analysis is based on Atlantic's past spectrum utilization, not its future ability to bid. Atlantic has the same opportunity as any other party to acquire spectrum rights through the auction process. Our rules did not contemplate extending the EI period for incumbents who were not successful bidders. Instead, our decision with respect to Atlantic's EI period is based on its lack of construction or other evidence of spectrum use that would warrant granting an additional two years. For these reasons, we deny Atlantic's petition for reconsideration.

B. Roberts Licensees

16. Background. In the *Extended Implementation Order* we determined that the Roberts Licensees had not justified continuation of their current extended implementation authority because they had not commenced construction of channels they received in October 1995 and had failed to provide an adequate justification for their lack of construction. We therefore denied their request for a two-year EI period.[44]

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[42] *800 MHz SMR First R&O* at 1521-22. *See also* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Further Notice of Proposed Rulemaking*, 10 FCC Rcd 7970 (1995).

[43] *See* 47 CFR § 90.629(c).

[44] *Extended Implementation Order*, ¶ 22.

17. Petitions. Like Atlantic, the Roberts Licensees in their Petition for Partial Reconsideration contend that the Bureau changed the standard for rejustification without giving notice.[45] The Roberts Licensees further maintain that they are entitled to the full two-year EI period because they complied with the implementation schedules set out in their initial justification.[46] The Roberts Licensees also complain of unequal treatment in comparison to DCL, a licensee who received the two-year EI period, but who, according to the Roberts Licensees, had not commenced construction.[47] The Roberts Licensees claim that regulatory delay, in the form of the Commission's freeze of the processing of 800 MHz licenses, was the primary reason for their not initiating construction.[48] They also argue that Section 257 of the Communications Act requires the Commission to consider the impact of such delays on small businesses and to permit the submission of modified business plans.[49] Finally, in their Expedited Petition for Tolling of Construction Deadline, the Roberts Licensees request that the Commission toll the construction deadline set in the *Extended Implementation Order* while the Commission acts on their reconsideration petition.[50] The Roberts' Licensees rely on *PSWF Corp. v. FCC*, 108 F.3d 354, 358 (D.C. Cir. 1997) (*PSWF*), to argue that a stay pending the outcome of this proceeding is appropriate.[51]

18. Discussion. For the same reasons discussed above, we reject the Roberts Licensees' arguments that (1) the Bureau changed the standard of review without notice and (2) the Roberts Licensees should receive the full two year period based solely on compliance with their original implementation plan.[52] We also find that the Roberts' Licensees are not entitled to the same treatment as DCL. As we noted in the *Extended Implementation Order*, DCL was the licensee of an existing analog system that requested EI authority to convert its system to digital operations. We also noted that DCL had begun construction of its digital system. Thus, we concluded that granting DCL additional time would not have a significant effect on spectrum

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[45] Roberts Licensees Petition for Partial Reconsideration at 11-14.

[46] *Id.*

[47] *Id.* at 14-16.

[48] *Id.* at 17-19. Petitioners argue that the processing freeze delayed the issuance of almost 90 percent of their licenses by two years from the date of filing of the applications. Petitioners contend that this delay had a detrimental impact on their ability to secure financing and move forward with their business plan. *Id.*, at 18.

[49] *Id.* at 19.

[50] *See* Expedited Petition for Tolling of Construction Deadline of Roberts Licensees, filed June 18, 1997, at 2; Expedited Petition for Tolling of Construction Deadline of Roberts Licensees, filed August 8, 1997, at 2.

[51] Expedited Petition for Tolling of Construction Deadline of Roberts Licensees, filed August 8, 1997, at 3.

[52] *See infra.*, at paras. 12-15.

availability.[53] The Roberts Licensees, by contrast, did not have existing analog facilities, and had not constructed any sites at the time of their rejustification request. Given these different situations, we find that our treatment of their requests was appropriate.

19. As we discussed in our response to Atlantic's arguments, we also do not find regulatory uncertainty to be an adequate justification, or a sufficiently unique circumstance, for failure to initiate construction. Furthermore, the freeze on applications cited by the Roberts Licensees did not affect the licenses granted to them in 1995 for which they requested and received initial EI authority. Finally, we reject the contention that Section 257 of the Act compels us to grant petitioners a two-year construction period. Among other things, Section 257 requires the Commission to conduct a proceeding with the purpose of eliminating market entry barriers for small businesses and entrepreneurs within 15 months of enactment of the 1996 Act, and to report to Congress every three years thereafter on further steps taken or recommended to eliminate such barriers. The Commission has conducted the required proceeding, and nothing in that proceeding supports the Roberts Licensees' contention.[54] Upon the release date of this order, the Roberts Licensees will have had their authorizations for over two years. Our decision not to grant them an additional two years to construct cannot be considered to constitute a "barrier to entry." Moreover, the Roberts Licensees had the opportunity to expand their spectrum holdings through participation in the upper band 800 MHz SMR auction currently being conducted and may also participate in the upcoming lower band 800 MHz SMR auction, both of which offer special bidding provisions to small businesses.[55] Therefore, we deny the Roberts Licensees' petition to receive an EI period of two years.

20. Furthermore, we do not find persuasive the Roberts Licensees' argument that their current EI period should be tolled for the time this petition has been pending. First, we do not agree with petitioners that the *PSWF* case requires us to toll the running of the construction period in all cases where the licensee files a petition for reconsideration. To the contrary, Section 1.102(b)(2) of our Rules states that an action taken on delegated authority that is the subject of a petition for reconsideration is stayed pending disposition of that petition only at the discretion of the designated authority.[56] We do not believe that the Roberts' Licensees have presented facts sufficient to justify our granting a tolling of the construction period here. As we discussed above, the Roberts Licensees have not presented any unique circumstances that distinguish them from other similarly situated incumbent SMR licensees who must meet the November construction deadline.

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[53] *Extended Implementation Order*, ¶ 9.

[54] *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, GN Docket No. 96-113, FCC 97-164 (rel. May. 8, 1997), 62 Fed. Reg. 34648 (June 27, 1997).

[55] *800 MHz SMR First R&O* at 1574.

[56] 47 C.F.R. § 1.102(b)(2).

21. We also believe the facts are distinguishable from those presented in *PSWF*. In that case, a paging licensee sought reconsideration of a Commission decision denying it "slow-growth" authority, and the Commission did not render its reconsideration decision for more than a year after the licensee's eight-month construction period would ordinarily have expired. The court agreed that the Commission had properly denied the petitioner's slow-growth request, but noted that the Commission had "conceded" that the licensee's petition for reconsideration and petition for judicial review tolled the expiration of the eight-month construction period.[57] We believe the Commission's "concession" -- which did not form the basis for any holding by the court -- was limited to the facts of that case, and does not limit the Commission's discretion to determine whether tolling is appropriate under other circumstances. In this case, unlike *PSWF*, we are deciding the Roberts Licensees' petition (and its tolling request) prior to the expiration of the construction period that is the subject of the petition. Thus, the Roberts Licensees cannot claim that tolling is necessary in order to prevent a lack of action on their petition from somehow extinguishing their rights as licensees. In addition, we note that our denial of the Roberts Licensees' tolling request does not prevent them from seeking Commission review of this Order.

22. We also disagree with petitioners' assertion that our granting of the requested stay would not substantially harm other interested parties and would be in the public interest. As we have discussed above, we believe that our approval of long construction periods for licensees who have not yet commenced construction would discourage the rapid deployment of a wide-area SMR system, and therefore, would be contrary to the public interest. Therefore, we deny the Roberts Licensees' petition to toll their current construction deadline.

C. Telecellular

23. Background. In our *Extended Implementation Order*, we declined to grant Telecellular an EI period of two years.[58] We found that Telecellular had not begun construction of its facilities and that permitting Telecellular to further postpone construction of its facilities for an indefinite period could hamper future EA licensees from complying with the construction requirements associated with their authorizations.[59]

24. Petition. Telecellular argues that its implementation plans were delayed by a nuisance lawsuit filed against it on April 11, 1996, in which plaintiffs Pendleton Waugh and Paul J. Conrad fraudulently asserted that they were entitled to control of Telecellular's telecommunications venture.[60] Telecellular, however, did not mention the existence of this

[57] *PSWF*, 108 F.3d at 358.

[58] *Extended Implementation Order*, ¶ 27.

[59] *Id.*

[60] Telecellular Petition at 5.

lawsuit as the primary cause of its failure to commence construction in its rejustification.[61] Telecellular submits that it did not bring this legal situation to the Commission's attention in its rejustification filing because it believed that establishing compliance with its EI benchmarks would be sufficient to receive the full two-year EI authority.[62] In addition, Telecellular states that it was concerned that discussing the lawsuit before the Commission would prejudice the ongoing proceedings in the Puerto Rico court.[63] Relying on Section 1.106(c) of the Commission's rules,[64] Telecellular requests that the Commission consider the new information about this lawsuit because consideration of such information would be in the public interest.[65]

25. In its petition, Telecellular maintains that the filing of the lawsuit caused its equipment vendor and primary lender, Ericsson, to cancel agreements that were necessary to Telecellular's planned buildout.[66] Although Telecellular worked with Paine Webber and GTE to secure replacement financing and engineering support, Telecellular contends that it was unable to proceed with these plans until it had successfully defended the lawsuit.[67] In support, Telecellular emphasizes that on April 11, 1997, it obtained a court judgment for $20 million on a counterclaim against plaintiffs for tortious interference in Telecellular's contractual relations with Ericsson and GTE, among others.[68] In addition, Telecellular notes that on October 24, 1997, it obtained a judgment in its favor from the Puerto Rico court dismissing the lawsuit against it and resolving all claims in Telecellular's favor.[69] Telecellular thus argues that the delay in

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[61] *See* Telecellular's Rejustification for Extended Implementation Authority, filed on July 15, 1996.

[62] Telecellular Petition at 9, 12.

[63] *Id.* at 12.

[64] Section 1.106(c) of the Commission's Rules states that a petition for reconsideration which relies on facts not previously presented to the Commission may be granted if the designated entity determines that consideration of the facts relied on is required in the public interest. *See* 47 C.F.R. § 1.106(c).

[65] Telecellular Petition at 10.

[66] *Id.* at 5-6.

[67] *Id.*

[68] Telecellular Petition at 17. *See also Telecellular de Puerto Rico, Inc. vs. Paul J. Conrad & Caribbean Spectrum, Inc.*, Final Judgment, Civil KAC 96-1112, Superior Court, San Juan (Apr. 11, 1997).

[69] Letter to David Furth, Chief, Commercial Wireless Division, WTB, from Telecellular de Puerto Rico, Inc., dated Oct. 30, 1997 (Oct. 30, 1997 Telecellular Letter). *See also Telecellular, Inc. vs. Telecellular de Puerto Rico,*

implementing its business plan resulting from the lawsuit constitutes a circumstance beyond its control, and that it is now prepared to proceed promptly with its implementation plan.[70]

26. Discussion. Upon our review of Telecellular's reconsideration petition, we agree that the circumstances presented by Telecellular are unique, and that its construction delays were caused by circumstances beyond its control. Although we ordinarily would not consider an extension to be justified based on the cancellation of equipment contracts and lending agreements, which are common business risks, we do not believe that Telecellular should be held responsible where the agreements were cancelled as the result of a frivolous third-party lawsuit. In reaching this conclusion, we rely on the court's dismissal of Waugh and Conrad's claim and on the court's finding that Waugh and Conrad tortiously interfered in Telecellular's contractual relationships with its equipment vendors and lenders. We believe that Telecellular's efforts to defend the lawsuit and obtain alternate financing constitute reasonable diligence under the circumstances. We believe that Telecellular should have presented the facts concerning the lawsuit to the Commission in its initial rejustification request. However, because the final disposition of the lawsuit did not occur until after Telecellular's initial filing, we conclude that it constitutes a changed circumstance that may legitimately be considered on reconsideration.[71] Therefore, upon reconsideration, we grant Telecellular the full two-year period to construct its system.

D. CTM

27. Background. In our *Extended Implementation Order*, we found that CTM had not commenced construction of its system and had therefore failed to justify more than the minimum six-month period to complete construction.[72]

28. Petition. CTM contends that the Bureau erred factually in stating that CTM had not begun construction of its system. CTM states that it had placed five trunked systems, or a total of 25 channels, in commercial operation when it filed its rejustification showing.[73]

29. Discussion. Upon further review of CTM's filing and our records, we find that Exhibit A of its rejustification does state that CTM placed five trunked systems in operation and

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[70] *Telecellular Petition* at 17-18. For its remaining arguments, Telecellular, like Atlantic, contends that the Commission did not provide notice of its criteria in reviewing the rejustifications and that participation in the 800 MHz auction would not make Telecellular "whole." We reject these arguments for the reasons stated above. *See* ¶¶ 12-15, *infra*.

[71] *See* 47 C.F.R. § 1.106(c).

[72] *Extended Implementation Order*, ¶ 15.

[73] CTM Petition at 7.

that this was inadvertently overlooked in our original review of CTM's request.[74] We thus find that CTM had in fact commenced construction of its system at the time it filed its rejustification showing and that our statement to the contrary in the *Extended Implementation Order* was incorrect. We also find that CTM has otherwise complied with the requirements of Section 90.629, and that its extended implementation plan will not result in inefficient spectrum use, prevent the rapid construction of wide-area systems, or obstruct the future construction plans of EA licensees. We therefore find that CTM has met our rejustification criteria, and should receive the full two-year EI period to construct its system.

E. CellCall and Entergy

30. Background. In the *Extended Implementation Order*, we found that CellCall and Entergy had successfully rejustified their EI authority, but concluded that each was entitled to less than the full two years because their original EI grants expired earlier than May 20, 1999. Because we found that CellCall's EI authority would expire on October 31, 1997,[75] and Entergy's on March 31, 1999, we declined to extend their construction periods further.[76]

31. Petitions. CellCall and Entergy contend that the Bureau incorrectly calculated their original EI expiration dates, and therefore granted them less time to construct than that to which they were entitled. CellCall states that the actual expiration date of its original EI authorization was October 31, 2000,[77] and Entergy states that its original EI period was scheduled to end on December 31, 2000.[78] Based on these corrected dates, both parties contend that they should have received the full two-year period granted to other licensees.

32. Discussion. Upon further review of our records, we find that the *Extended Implementation Order* inadvertently misstated the current expiration dates of the EI authority of both CellCall and Entergy. Because both EI deadlines fall in the year 2000, we conclude that CellCall and Entergy should receive the full two-year EI period, to May 20, 1999, to construct their facilities.

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[74] *See* CTM's Extended Implementation Rejustifications, Exhibit A, filed on July 12, 1996.

[75] *Extended Implementation Order* at footnote 27. *See also id.*, ¶ 10.

[76] *Id.*

[77] CellCall Petition at 1-2.

[78] Entergy Petition at 3.

IV. ORDERING CLAUSES

33. IT IS ORDERED that, pursuant to Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petitions for Reconsideration filed by the parties listed in Appendix A ARE GRANTED IN PART to the extent discussed herein, and ARE OTHERWISE DENIED.

34. IT IS FURTHER ORDERED that the Roberts Licensees' Expedited Petitions for Tolling of Construction Deadline, filed June 18 and August 8, 1997, ARE DENIED.

35. This action is taken pursuant to delegated authority as set forth in Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon
Chief, Wireless Telecommunications Bureau

APPENDIX A

Licensee	Construction Deadline
Atlantic Cellular Company, L.P.	November 20, 1997.
CellCall, Inc.	May 20, 1999.
Centennial Telecommunications of the Midwest, Inc.	May 20, 1999.
Entergy Services, Inc.	May 20, 1999.
Licensees represented by K. Steven Roberts	November 20, 1997.
Telecellular	May 20, 1999.