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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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OFFICE OF THE SECRETARY

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

To: The Commission

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

TELECELLULAR

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SUMMARY

Pursuant to Federal Communications Commission ("FCC" or "Commission") Rule Section 1.106(g), the participating Specialized Mobile Radio ("SMR") licensees in the joint venture identified as TELECELLULAR submit this opposition to the North Sight Communications, Inc.'s ("North Sight" or "Petitioner") Petition for Partial Reconsideration of the Wireless Telecommunications Bureau's ("WTB" or "Bureau") decision of November 12, 1997, which granted TELECELLULAR's Petition for Reconsideration of the WTB's denial of TELECELLULAR's rejustification of its extended implementation ("EI") authorization.

North Sight's Petition should be dismissed on the basis that it is an untimely filed petition for reconsideration. Although captioned a Petition for Partial Reconsideration of the WTB's decision to grant TELECELLULAR a full two-year EI period to construct its system, the Petition is actually an untimely Petition for Reconsideration of the original participating license grants and initial EI authority.

If the Commission does consider the substance of North Sight's Petition, the agency should find it entirely without merit and deny it. North Sight asks the Bureau to invoke its revocation authority on the basis of what it asserts were real party-in-interest violations involving the licensees of the participating stations and because of alleged deficiencies in the legal status of the licensee entities both at the time the authorizations were issued and as of the date of the Petition. Both allegations are without merit. North Sight has failed to present facts regarding its real party-in-interest claim which, if proven, would support the revocation of the participating station licenses. Additionally, North Sight's allegation that the subject corporations lacked the requisite legal qualifications to be Commission licensees when they filed their applications must

be rejected for several reasons. First, the Commission has repeatedly held that questions involving interpretation or violation of state law must be presented first to the appropriate state officials. Second, FCC precedent would not support a finding that a deficiency in corporate standing is sufficient to deny or revoke a license. Third, North Sight's claim that the participating licensees' applications were defective or unacceptable for filing because they did not contain particular ownership information is baseless since neither the FCC Form 574 nor any special requirements applicable to the SMR service required any showing with respect to the stockholders, officers or directors of a corporation or a joint venture. Similarly, North Sight's allegations that the Bureau erred in granting TELECELLULAR's initial request for EI authority because it never submitted documentation to the Commission demonstrating its legal existence or confirmation that the participating stations endorsed its request do not constitute a basis for revocation.

Finally, the Bureau's grant of TELECELLULAR's Petition For Reconsideration was not in error. The Commission has ample authority to exercise its discretion in considering such matters, limited only by its obligation to follow its own rules and not to act in an arbitrary or capricious fashion.

By counsel, and pursuant to Federal Communications Commission ("FCC" or "Commission") Rule Section 1.106(g),[1] the participating Specialized Mobile Radio ("SMR") licensees in the joint venture identified as TELECELLULAR respectfully submit this opposition to North Sight Communications, Inc.'s ("North Sight" or "Petitioner") Petition for Partial Reconsideration[2] of the Wireless Telecommunications Bureau's ("WTB" or "Bureau") decision of November 12, 1997,[3] which granted TELECELLULAR's Petition for Reconsideration[4] of the WTB's denial of TELECELLULAR's rejustification of its extended implementation ("EI") authorization.[5] In support thereof the following is shown:

I. Background

1. The Commission is familiar with the history of TELECELLULAR's EI authority and construction status. TELECELLULAR described its system in its Petition for Reconsideration of the WTB's denial of its EI Rejustification,[6] while North Sight's Petition has described the chronology of TELECELLULAR's various filings with the Commission.[7] Accordingly, TELECELLULAR will not reiterate them here in detail.

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[1] 47 C.F.R. § 1.106(g).

[2] North Sight Communications, Inc., Petition for Partial Reconsideration (filed Dec. 12, 1997)("North Sight Petition").

[3] Memorandum Opinion and Order, PR Docket No. 93-144, 12 FCC Rcd ___ (rel. Nov. 12, 1997)("MO&O").

[4] TELECELLULAR, Petition for Reconsideration (filed June 20, 1997) and incorporated herein by reference. ("TELECELLULAR Petition for Reconsideration").

[5] Order, PR Docket No. 93-144, DA 97-1059, 12 FCC Rcd ___ (rel. May 20, 1997) ("EI Order").

[6] TELECELLULAR Petition for Reconsideration at 1-7.

[7] North Sight Petition at 3-5.

2. On May 24, 1994, TELECELLULAR, a Puerto Rico joint venture, requested approval from the FCC for EI authority to use the frequencies associated with the participating stations to construct a digital, wide area SMR system throughout the Island of Puerto Rico pursuant to FCC Rule Section 90.629.[8] Amendments to TELECELLULAR's request were filed on July 29, 1994 and September 13, 1994. The Commission granted TELECELLULAR's EI request on February 27, 1995. On May 17, 1995, TELECELLULAR sought FCC approval of an amendment of the associated construction schedule. The Commission granted the amendment on July 31, 1995. The Commission subsequently denied TELECELLULAR's EI rejustification showing, submitted in response to the directive in PR Docket No. 93-144.[9] Upon reconsideration, however, the FCC determined that, "...the circumstances presented by Telecellular [sic] [in support of its reconsideration request] are unique, and that its construction delays were caused by circumstances beyond its control."[10]

3. Now, two years after the Commission's original grant of the EI authority, and as long as four years after the initial grant of the participants' licenses, North Sight asks the Commission to determine that neither the original licenses nor the EI authority should ever have been granted and to revoke the various authorizations. Additionally, or perhaps alternatively, the Petitioner asserts that the Commission erred in granting TELECELLULAR'S Petition for Reconsideration.

4. Thus, although captioned a Petition for Partial Reconsideration of the WTB's

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[8] 47 C.F.R. § 90.629.

[9] First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, PR Docket No. 93-144, 11 FCC Rcd 1463, 1525 ¶ 111 (1995).

[10] MO&O at ¶ 26.

decision to grant TELECELLULAR a full two-year EI period to construct its system, the Petition is actually an untimely Petition for Reconsideration of the original participating license grants and initial EI authority. Accordingly, TELECELLULAR submits the Petition should be dismissed. If the Commission does consider the substance of the Petition, the agency should find it entirely without merit and deny it.

II. North Sight Had Full Knowledge of TELECELLULAR's EI Status When It Elected to Place What Became the Winning High Bid for a 120-Channel Puerto Rico Geographic License.

5. As an initial matter, TELECELLULAR must question whether Petitioner has been entirely forthcoming in respect to its lack of knowledge regarding TELECELLULAR's June 20, 1997 Petition for Reconsideration in its assertion that:

> ...counsel to North Sight did check with the Commission shortly after the Commission's requested correction date of September 15, 1997 [for the Commission's Public Notice, "Petitions and Applications Affecting 800 MHz Specialized Mobile Radio Upper Band Spectrum"] and did not find any reference to Telecellular's Petition. **As a result, North Sight made its bidding strategy (including decisions as to whether to purchase other analog systems in the area) based upon its belief that Telecellular's system would need to be constructed by November, 1997.**[11]

6. It may be that Petitioner was not aware of the pending TELECELLULAR Reconsideration request when it decided to enter the auction or when it formulated its original bidding strategy, although the relevance of such facts is not entirely clear in light of the disclaimer on the cited Notice.[12] However, the MO&O granting TELECELLULAR's request

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[11] Petition at 2 (emphasis added).

[12] Public Notice, "Wireless Telecommunications Bureau Identifies Petitions and Applications Affecting 800 MHz Specialized Mobile Radio Upper Band Spectrum", DA 97-1901 (rel. Sept. 4, 1997) ("Notice").

was issued and released on November 12, 1997, almost one month before the conclusion of the 800 MHz auction. Counsel for North Sight also called the undersigned on November 18, 1997 requesting clarification regarding TELECELLULAR's regulatory status and was advised generally in respect to the substance of the Reconsideration Request and the litigation.

7. Subsequently, on December 4, 1997, during Round 197 of the 800 MHz upper channel auction, Nextel Communications, Inc. replaced North Sight as the high bidder on the C Block in EA174. Later that same day, Petitioner elected to submit a higher bid in Round 199, which ultimately proved to be the "winning" bid, with full knowledge of the status of TELECELLULAR's EI. Having elected to pursue that bidding strategy, and to forego the opportunity to avoid the obligations of winning that authorization, North Sight hardly now can complain that it did so based on a mistaken understanding of TELECELLULAR's construction obligations.[13]

III. North Sight's Petition is an Untimely Request for Reconsideration of the Original Issuance of the Participating Licenses and of TELECELLULAR's EI Authority.

8. The Petition asserts that the subject licenses should not have been granted initially. Although styled a Petition for Partial Reconsideration of the Commission's decision to grant TELECELLULAR's Rejustification of its EI, that argument actually constitutes an untimely petition for reconsideration of the initial grants of the participating licenses. Since Section 405 of the Communications Act[14] and § 1.429(d)[15] of the Commission's Rules provide that petitions

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[13] Additionally, it is questionable whether North Sight, as an applicant, has standing to challenge the Commission's grant. See Atlantic Telecasting Corp., 3 FCC 2d 442 (1966); McClatchy Newspapers, 73 FCC 2d 171 (1979).

[14] 47 U.S.C. § 405.

[15] 47 C.F.R. § 1.429(d).

for reconsideration must be filed within thirty days from the date of public notice of the action for which reconsideration is sought, the instant pleading, filed years after the relevant thirty day filing period expired, is clearly untimely and should be dismissed.[16]

9. North Sight also challenges the original grant of EI authority to TELECELLULAR's participating licensees.[17] Like the attack on the original license grants, North Sight's pleading is, in fact, a request for reconsideration of the initial EI authorization and, for the reasons described above, was required to have been submitted to the Commission within thirty days of that February 1995 action. Thus, the instant pleading is delinquent by more than two and one-half years in respect to that issue and must be dismissed on that basis.

IV. The Petition Fails to Present Facts Which, if Proven, Would Support the Issuance of an Order to Show Cause as to Why the Participating Station Licenses Should be Revoked.

10. There are specific processes the FCC must follow if it believes that a licensee should be precluded from operating on a frequency for which it holds a final grant.[18] Pursuant to Section 312(a) of the Communications Act, the Commission may revoke a license or

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[16] See, e.g. Virgin Islands Telephone Corp. v. FCC, 989 F.2d 1231, 1237 (D.C. Cir. 1993) ("[t]he Commission's refusal to entertain Vitelco's petition for reconsideration [filed 31 days late] was justified"]; and Reuters Ltd. v. FCC, 781 F.2d 946, 952 (D.C. Cir. 1986) ("[t]he Commission acted beyond its lawful authority when it entertained the belated petition for reconsideration"); and Nextel Communications, Inc., DA 98-9, 12 FCC Rcd __ (rel. Jan. 6, 1998).

[17] North Sight Petition at 7-8.

[18] Before the Commission may revoke a license, it first must issue an order directing the licensee to show cause why an order of revocation or a cease and desist order should not be issued. 47 C.F.R. § 1.91; see also, 5 U.S.C. § 558, the Administrative Procedure Act. Such an order calls upon the licensee to whom it is directed to appear before the Commission at a hearing. 47 C.F.R. § 1.91(b). The licensee then has thirty days to file a written appearance stating that he will appear at the hearing and present evidence on the matters specified in the order. 47 C.F.R. § 1.91(c).

construction permits under the following conditions:

> (1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;
>
> (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;
>
> (3) for willful or repeated failure to operate substantially as set forth in the license;
>
> (4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treat ratified by the United States;
>
> (5) for violation or failure to observe any final cease and desist order issued by the Commission under this section;
>
> (6) for violation of sections 1304, 1343, or 1464 of title 18 of the United States Code; or
>
> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[19]

The rules further specify that the burden of proof in such proceedings is on the Commission.[20]

11. North Sight asks the Bureau to invoke its revocation authority on the basis of what it asserts were real party-in-interest violations involving the licensees of the participating stations and because of alleged deficiencies in the legal status of the licensee entities both at the time the authorizations were issued and as of the date of the Petition.[21] Both allegations are without merit.

12. The sole factual basis on which the Petition rests its accusation that the

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[19] 47 U.S.C. § 312(a).

[20] 47 C.F.R. § 1.91(d)(2).

[21] North Sight Petition at 9.

participating licensees were guilty of "multiple violations of the 40 mile rule" is the fact that their applications all were filed by one of two entities, a company in Ohio or a communications law firm in Washington, D.C.[22] If such an allegation were sufficient to prove a real-party-in-interest violation, then it would appear that all applications submitted through law firms, consultants, or others engaged in licensing activities would be similarly defective. That would include geographically proximate applications filed as part of groups managed by entities such as PowerFone, Inc., Bayou Communications, Inc., Advanced MobileComm of New England, Texas, North Carolina, et al. and others which, to the best knowledge and belief of TELECELLULAR, were filed by Petitioner's own counsel.

13. North Sight has failed to present facts regarding this issue which, if proven, would support the revocation of the participating station licenses. Its Petition must be denied as to that issue.

14. The Petitioner also chastises the FCC for failing to scrutinize sufficiently the bona fides of the applicants when the participating station licenses were granted. North Sight alleges that, according to its research, various of those entities had not completed their state incorporation process at the time the Commission granted the relevant authorizations.[23] As a result, North Sight argues those corporations were ineligible to be Commission licensees.[24] The Petitioner further notes that some of these licensees have had, or may have, their corporate charters revoked for failure to pay required corporate fee levies.

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22 North Sight Petition at 7.

23 Id.

24 Id.

15. North Sight's allegation that these corporations lacked the requisite legal qualifications to be Commission licensees when they filed their applications must be rejected for several reasons. First, the Commission has repeatedly held that questions involving interpretation or violation of state law must first be presented to the appropriate state officials.[25] This practice has been followed specifically with respect to matters involving corporate authority. Thus, in North American Broadcasting Co., Inc.,[26] the Review Board refused to add a legal qualifications issue where it was alleged that the president and secretary of a corporate applicant were the same person in contravention of state law. The Board acknowledged that the application had been amended to conform with the state law, and as to the status of the previous corporate action, the Board stated that the Commission has traditionally declined to interfere in questions of alleged state law violation which have not been presented to the appropriate state forum. Likewise, in Intercast, Inc.,[27] the Board declined to add a legal qualifications issue where an applicant's corporate status had been suspended for failure to pay state franchise taxes. The Board's decision was based on the fact that the suspension had been lifted when the applicant paid the overdue taxes following the filing of the petition to enlarge issues, and on the principle that the Commission will not interfere in questions of alleged state law violations where no claim has been made in the state courts and the determination is one that is more appropriately a matter of state resolution.

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[25] See, e.g. Leflore-Dixie, Inc., 57 Rad. Reg. 2d (P&F) 1155 100 FCC 2d 331 (Rev. Bd. 1985); Central Texas Broadcasting Co., Ltd., 90 FCC 2d 583 (Rev. Bd. 1982); WHW Enterprises, Inc., 89 FCC 2d 799 (1982); Jacksonville Broadcasting Co., 21 Rad Reg. 2d (P&F) 931 (Rev. Bd. 1971).

[26] North American Broadcasting Co., Inc., 15 FCC 2d 979 (Rev. Bd. 1969).

[27] Intercast, Inc., 43 FCC 2d 658 (Rev. Bd. 1973).

16. There have been many cases where a licensee's or applicant's qualification to hold an FCC license have been challenged on the basis that the licensee or applicant is not in "good corporate standing." However, there are no cases which hold that this deficiency, after having been corrected, is sufficient to deny or revoke a license. And certainly no case holds that such a deficiency renders a license void ab initio. In J. Sherwood, Inc.[28] the Commission declined to enlarge the issues to include legal qualifications and related misrepresentation issues despite that the applicant was not in good corporate standing with the state corporate authorities due to its failure to submit its 1975 annual corporate return. The Commission stated:

> It appears that, by failing to file its annual return, Sherwood has merely violated a technical state requirement which can easily be cured by filing the necessary information. Consequently, a substantial question has not been raised regarding its legal qualification. . . . As to the requested misrepresentation issue, although Sherwood has filed amendments, under its corporate title subsequent to losing corporate "good standing" on April 1975, as we noted above, it does not appear that Sherwood's legal qualification are in serious jeopardy and, consequently, we do not believe that a substantial questions of misrepresentation has been raised.[29]

17. The same determination is required here. There is no indication that North Sight has presented the question of the corporate status of these licensees to state officials for their

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[28] J. Sherwood, Inc., 63 FCC 2d 151 (1976).

[29] Id. at 161. See also Metro Broadcasting, Inc., 99 FCC 2d 688, 694, n.4 (1984) ("We also note the ALJ's finding that 'no legal partnership' was ever formed for El Dorado and was not formed for Rainbow until the hearing was underway . . . . These findings are without any decisional importance because they neither support the ALJ's lack of candor conclusions nor reveal any legal defect in the applicant Rainbow. Cf. High Sierra Broadcasting, Inc., 56 RR 2d 1394, 1396 (Comm'n 1984). Indeed, no issue pertaining to legal qualifications was specified with regard to either the El Dorado or Rainbow application."); and Great Southwest Media Corp., 49 FCC 2d 1291, 1292 (1974) ("Thus, it is clear that the reinstatement of Southwest's corporate charter 'seemingly moots any question concerning its prospective corporate activity in prosecuting its application' . . . and consequently a legal qualification issue will not be added.").

resolution. Thus, North Sight should not be heard to attack this status collaterally at the Commission Moreover, as indicated on the attached Exhibit A, the licensees were properly incorporated immediately after FCC issuance of their licenses. As the Commission is aware, there already was substantial SMR spectrum scarcity at the time these entities requested their authorizations; many applications filed in the same time frame were placed on Commission waiting lists because no channels were available for assignment to them. Thus, it was not unreasonable for these companies to confirm that there was spectrum assignable to them before completing the incorporation process. They now have undertaken the ministerial process of reviving their corporate charters by paying past due taxes, and will be considered by the State of Delaware to be legally qualified in all material respects.

18. Finally, North Sight appears to argue that the FCC was delinquent in not requiring the applicants to demonstrate their bona fides before granting the applications.[30] That allegation is incorrect. Neither, the FCC Form 574 nor any special requirements applicable to the SMR service required the FCC to review any showing with respect to the stockholders, officers or directors of a corporation or a joint venture. Although Commercial Mobile Radio Service ("CMRS") SMR applicants must now submit an FCC Form 430: Licensee Qualification Report along with an FCC Form 600, that requirement was not in effect when these applications were submitted.[31] At that time, the Commission's licensing procedures specified:

Part 90 applicants are required only to certify compliance with Section 310(a),

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[30] North Sight Petition at 6-7.

[31] See Third Report and Order, GN Docket No. 93-252, 9 FCC Rcd 7988 ¶ 300 (1994)("Our current licensing procedures require Part 22 applicants to provide certain qualifying information that is not required of Part 90 applicants.")

> which bars foreign governments and their representatives from holding any Commission license. See Form 574, Certification No. 4.[32]

Accordingly, any claim that the participating licensees' applications were defective or unacceptable for filing because they did not contain particular ownership information is baseless.

V. The Petition Fails to Present Facts Which, if Proven, Would Support Revocation of TELECELLULAR's Original EI Authority.

19. North Sight asserts that the Bureau erred in granting TELECELLULAR's initial request for EI authority. According to North Sight, TELECELLULAR lacked authority to request this authority because it had never submitted documentation to the Commission demonstrating its legal existence or confirmation that the participating stations endorsed its request.[33] However, neither allegation constitutes a basis for revocation of TELECELLULAR's EI authority.

20. As explained above, the question of the legal status of an applicant is a matter of state law. Thus, the issue of whether the Joint Venture had authority to act is a question of Puerto Rican law. As detailed in Exhibit B, under Puerto Rican law, a joint venture is not a distinct legal entity; a joint venture is the joint activity of several entities towards a common goal pursuant to the contractual relationship among them.[34] Accordingly, no special requirements need be met to confirm the validity of the joint venture; it need only meet those that apply generally to any valid contract.

21. As explained in TELECELLULAR's Petition for Reconsideration, TeleCellular de

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[32] Id. at n. 546.

[33] North Sight Petition at 7.

[34] See Planned Credit of P.R. v. Page, 123 DPR 245, 3 OTOSCRPR 344 at 347C (1975).

Puerto Rico, Inc. ("TPR"), is a corporation with a single purpose of developing a wireless telecommunications system in Puerto Rico. TPR entered into project agreements with the participating licensees in anticipation of developing this digital SMR network under the TELECELLULAR joint venture authority. A number of the documents relating to the joint venture and to its efforts to develop the system in question were provided to the Commission in support of that Petition for Reconsideration, pursuant to a request for confidentiality. Should the FCC require any additional materials in respect to this matter, they will be provided expeditiously.

22. Thus, it is evident that the joint venture identified as "TELECELLULAR" is a valid legal entity pursuant to the laws of Puerto Rico. Moreover, the contracts that gave it birth and sustain it have been held to be valid and enforceable by the Puerto Rico courts. On October 23, 1997, the final judgment in Civil KPE 96-0263 (807) Superior Court, San Juan TeleCellular, Inc. and others v. TeleCellular de Puerto Rico, Inc. and others, upheld the validity of the Joint Venture agreements and related documents that entrust TPR and its management with the development of the system.[35]

23. The Petitioner's assertion that the lack of affirmative endorsement at the FCC of the EI joint venture by the participating licensees invalidates the EI authority also is insufficient to support revocation of TELECELLULAR's EI authority, an authority similar to that awarded to numerous EI holders in recent years.[36] In light of the number of wide-area and EI

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[35] An English translation of the court's Findings of Fact and Law and Judgment by Default, KPE 96-0263 (807) is attached hereto as Exhibit C.

[36] See K. Steven Roberts, Extended Implementation Request (filed Jan. 25, 1995) and letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch, FCC to K. Stevens

authorizations granted over the last five or six years, and the number of individual stations involved in them, TELECELLULAR would be surprised if all participating stations had confirmatory letters on file with the Commission. Should the Commission require confirmation that these licensees continue their intention of participating in the network, it will be provided.[37]

VI. The WTB's Grant of TELECELLULAR's Petition For Reconsideration Was Not In Error.

24. Finally, the Petitioner argues that the FCC erred in granting TELECELLULAR's Petition for Reconsideration of its EI status. North Sight fails to acknowledge that the Commission has ample authority to exercise discretion in considering such matters, limited only by its obligation to follow its own rules[38] and not to act in an arbitrary or capricious fashion.[39]

Roberts, ref. no. 7110-163 (Mar. 3, 1995); DCL Associates, Inc., Request for Extended Implementation Authority (filed March 28, 1994) and Letter from Michael J. Regiec, Deputy Chief, Land Mobile Branch, FCC to Raymond A. Kowalski, Keller and Heckman, ref. no. 7110-227 (Aug. 31, 1994).

[37] To the best of TELECELLULAR's knowledge, and contrary to the insinuation in the Petition, none of the participating station licensees have indicated an intent to withdraw from TELECELLULAR, even those involved in the litigation described in the TELECELLULAR Petition for Reconsideration. There is no support for the allegation that the existence or absence of formal participation letters on file with the FCC would have prevented litigation, just as the existence of valid contracts, as recently confirmed by the Puerto Rican courts, did not prevent it. TELECELLULAR also disputes the Petitioner's assertion that half of the original participants are involved in the litigation. In fact, only 3 out of 17 licensee entities pursued that legal action to its finality, and, in any event, that litigation has been resolved entirely in TELECELLULAR's favor. See Exhibit C.

[38] Gardner v. FCC, 530 F.2d 1086, 1089 (1976) citing Service v. Dulles, 354 U.S. 363 (1957); Nader v. Nuclear Regulatory Comm'n, 513 F.2d 1045, 1051 (1975); Borough of Landsdale v. FPC, 494 F.2d 1104, 1113 (1974).

[39] 5 U.S.C. § 706(2)(A). Under the arbitrary and capricious standard, the court's scope of review is narrow, and a court may not "substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 US 29, 43 (1983). See also, Udall v. Tallman, 380 US 1, 16-17, reh'g denied, 380 US 989 (1965).

25. The Commission acknowledged that it ordinarily does not consider business risks as justification for construction extensions.[40] However, it found TELECELLULAR had presented "unique circumstances" to support reconsideration of the agency's initial decision. Specifically, the Commission determined that TELECELLULAR should not be held responsible where its business agreements were cancelled as the result of a frivolous third-party lawsuit.[41]

> 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 relationship with its equipment vendors and lenders.[42]

26. North Sight asserts that the Commission erred in that finding because the FCC allegedly reached different conclusions in factually indistinguishable cases. The Petition does not support that claim. The cases cited in the Petition do not involve the type of egregious, frivolous litigation described in the EI Petition for Reconsideration which specifically formed the basis for the FCC's determination. The Petitioner effectively is challenging the essence of the Commission's discretionary authority in such matters, but North Sight's judgment cannot be substituted for that of the agency.[43] Thus, on this basis also the Petition should be denied.

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40 MO&O at ¶ 26.

41 Id.

42 Id.

43 Moreover, the Commission has previously held that certain third party actions which interfere with a licensee's FCC obligations are beyond the control of the licensee. See letter from Terry L. Fishel, Chief, Land Mobile Branch to Elizabeth R. Sachs, Lukas McGowan, Nace & Gutierrez, ref. no. 7110-181 (Sep. 5, 1995) ("The delay in renovations by the City of [sic] Clemente was due to circumstances beyond the control of the licensee. Therefore, the Commission will allow Dan Dorough until September 28, 1995 to fully implement his radio station."). A copy of the letter is attached hereto as Exhibit D.

VII. Conclusion

TELECELLULAR urges the Commission to dismiss or deny North Sight's Petition and to reaffirm the EI authority as currently granted.

TELECELLULAR

OPPOSITION TO PETITION FOR PARTIAL RECONSIDERATION

EXHIBIT A

TELECELLULAR
Opposition to Petition for Partial Reconsideration

EXHIBIT A

Participating Licensee Incorporation/License Grant Chronology

Licensee	*Date Certfiicate of Incorporation Filed*	*App Grant Date*	*Call Sign*
APEX Comm.	?	3/21/94	WPDQ861
Arecibo SMR, Inc.	4/14/93	4/11/94	WPDQ881
Arecibo SMR, Inc.	4/14/93	4/11/94	WPDQ882
Caribbean Communication, Inc.	10/2/92	9/23/93	WPDF772
Caribbean Communication, Inc.	10/2/92	10/31/95	WPDF773
Caribbean Communication, Inc.	10/2/92	9/23/93	WPDF774
Caribbean Digital Comm., Inc.	10/2/92	9/24/93	WPDF778
Caribbean Digital Comm., Inc.	10/2/92	9/24/93	WPDF779
Caribbean Digital Comm., Inc.	10/2/92	10/31/95	WPDF780
Caribbean SMR, Inc.	10/2/92	10/31/95	WPDF781
Caribbean SMR, Inc.	10/2/92	9/24/93	WPDF782
Caribbean SMR, Inc.	10/2/92	9/24/93	WPDF783
Caribbean Spectrum, Inc.	10/2/92	9/23/93	WPDF775
Caribbean Spectrum, Inc.	10/2/92	9/24/93	WPDF776
Caribbean Spectrum, Inc.	10/2/92	10/31/95	WPDF777
Carlos Rodriquez Botet	N/A	9/3/93	WPDB853
Island Comm., Inc.	10/2/92	10/31/95	WPDF793
Island Comm., Inc.	10/2/92	9/27/93	WPDF794
Island Comm., Inc.	10/2/92	9/27/93	WPDF795
Island Digital Comm, Inc.	10/2/92	9/27/93	WPDF792
Island Digital Comm., Inc.	10/2/92	9/27/93	WPDF790
Island Digital Comm., Inc.	10/2/92	10/31/95	WPDF791
Island SMR, Inc.	10/2/92	10/31/95	WPDF351
Island SMR, Inc.	10/2/92	9/27/93	WPDF799
Island SMR, Inc.	10/2/92	9/27/93	WPDF801
Island Spectrum, Inc.	10/2/92	9/27/93	WPDF787
Island Spectrum, Inc.	10/2/92	10/31/95	WPDF788
Island Spectrum, Inc.	10/2/92	9/27/93	WPDF789
Luis Carrassquillo	N/A	9/2/93	WPDB846
Mayaguez SMR, Inc.	4/14/93	4/11/94	WPDQ879
Mayaguez SMR, Inc.	4/14/93	4/11/94	WPDQ880
Ponce SMR, Inc.	4/14/94	4/11/94	WPDQ884
San Juan-Caguas SMR, Inc.	4/14/94	4/11/94	WPDQ883
SMR Digital PR, Inc.	10/2/92	10/31/95	WPDF796
SMR Digital PR, Inc.	10/2/92	9/27/93	WPDF797
SMR Digital PR, Inc.	10/2/92	9/27/93	WPDF798
SMR Spectrum PR, Inc.	10/2/92	10/31/95	WPDF785
SMR Spectrum PR, Inc.	10/2/92	9/27/93	WPDF786
SMR Spectrum, PR, Inc.	10/2/92	9/27/93	WPDF784

State of Delaware

Office of the Secretary of State

I, WILLIAM T. QUILLEN, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF INCORPORATION OF "MAYAQUEZ SMR, INC." FILED IN THIS OFFICE ON THE FOURTEENTH DAY OF APRIL, A.D. 1993, AT 9 O'CLOCK A.M.

A CERTIFIED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO KENT COUNTY RECORDER OF DEEDS FOR RECORDING.

* * * * * * * * * *

William T. Quillen

William T. Quillen, Secretary of State

AUTHENTICATION: #3859681

DATE: 04/15/1993

753104002

State of Delaware

Office of Secretary of State

I, MICHAEL RATCHFORD, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF INCORPORATION OF "ISLAND SPECTRUM, INC." FILED IN THIS OFFICE ON THE SECOND DAY OF OCTOBER, A.D. 1992, AT 9 O'CLOCK A.M.

A CERTIFIED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO KENT COUNTY RECORDER OF DEEDS FOR RECORDING.

* * * * * * * * * *

DEPARTMENT OF STATE
OFFICE OF THE SECRETARY OF STATE
DELAWARE

Michael Ratchford, Secretary of State

AUTHENTICATION: 3613217

DATE: 10/02/1992

PRENTICE HALL LEGAL & FINANCIAL SERVICES

Federal Express
April 20, 199

Simon & Schuster Business & Professional Group
32 Loockerman Square
Suite L-100
Dover, DE 19901
302-674-1221 • 800-866-0221
Fax 302-674-0266

EXPRESS COMMUNICATIONS, INC.
Att: Karen Lee Matuszewski
14755 Preston Road, Suite 400
Dallas, TX 75240

RE: ARECIBO SMR, INC. - Certificate of Incorporation filed April 14, 1993 at 9 A.M.

Dear Ms. Matuszewski:

The above document was filed and recorded by the office of the Secretary of State of the State of Delaware on the date indicated.

If this company is qualified in any other jurisdiction, it may be necessary to file a certified copy and/or other evidence or documents as and where required.

The following documents are enclosed:

1 Certified Copy

____ Short Form Certificate of Good Standing

____ Long Form Certificate of Good Standing

____ Certificate Reciting Change of Name

____ Certificate Reciting Merger

____ Certified Copy Corporate Record

Other _____

By: Diane Flanagan

cc: Amy Hopson * Dallas/PHL&FS

J.O. _____

PRENTICE HALL LEGAL & FINANCIAL SERVICES

Simon & Schuster Professional Information Group
[illegible]
Suite [illegible]
Dallas, TX 75201
214-220-2[illegible] • [illegible]
Fax 214-720-[illegible]

October 5, 1992

Ms. Karen Lee Matuszewski

Four Forest Plaza, Suite 350
12222 Merit Drive
Dallas, TX 75251

Re: Delaware Incorporation
Our files 94-92-00986 - 94-92-00995

Dear Ms. Matuszewski:

Enclosed please find official evidence from the Delaware Secretary of State in connection with the recent incorporation of the following entities;

- Caribbean Communication, Inc.
- Caribbean Digital Communications, Inc.
- Caribbean Spectrum, Inc.
- Caribbean SMR, Inc.
- Island Communications, Inc.
- Island Digital Communications, Inc.
- Island Spectrum, Inc.
- Island SMR, Inc.
- SMR Digital P.R., Inc.
- SMR Spectrum P.R., Inc.

The date of filing for all of the above was October 2, 1992. If you have any questions or concerns regarding the enclosed, please don't hesitate to contact me.

Since this concludes our assistance with these filings, a statement will arrive shortly.

Very truly yours,

Cheryl Sparks
Corporate Specialist

Enc.