

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

In the Matter of)
)
Revision of Part 22 and Part 90) WT Docket No. 96-18
of the Commission's Rules to Facilitate)
Future Development of Paging Systems)

To: The Chief, Wireless Telecommunications Bureau

PETITION FOR RECONSIDERATION

EXPRESS MESSAGE CORPORATION (Express), by its attorney, respectfully petitions the Federal Communications Commission for reconsideration in part, as hereinafter set forth, of the Order in the captioned proceeding issued by the Chief, Commercial Wireless Division, DA 98-2543, adopted and released December 14, 1998.¹ Reconsideration is sought because the Order erroneously dismisses certain applications by Express for 931.3125 MHz that properly should not be considered mutually exclusive. In support of its petition, Express respectfully states:

The Order dismisses what the Commission deems to be pending mutually exclusive paging applications, as well as all paging applications filed after July 31, 1996, in an attempt to clear the decks for the auctions of geographic licenses for paging systems. *See Future*

¹ The instant petition is being filed as a protective measure, in order to clearly preserve Express' rights with respect to applications at issue. Because the Order was issued in a notice and comment rulemaking proceeding, the rules provide that public notice thereof is not given until publication in the Federal Register. *See* 47 C.F.R. §1.4(b)(1). In turn, the law is clear that the time for petitioning for reconsideration does not start to run until public notice is given of the action for which reconsideration is being sought. However, Express has been advised informally that there are no plans at this time to publish the Order in the Federal Register; thus, this petition is necessary to protect against any future claim that the release of the Order constituted public notice thereof under the rules.

Development of Paging Systems (Second Report and Order and Further Notice of Proposed Rulemaking), WT Docket No. 96-18, 12 FCC Rcd 2732 (FCC 1997). Included in the list of applications dismissed as mutually exclusive are several A40-mile extension applications filed by Express for 931.3125 MHz during the post-freeze filing window provided by the Commission in 1996, viz., applications at Dallas, TX (Call Sign KNKO610, File No. 29057-CD-P/ML-96); Denton, TX (Call Sign KNKO610, File No. 28999-CD-P/ML-96); Mesquite, TX (Call Sign KNKO610, File No. 32340-CD-P/ML-96); Plano, TX (Call Sign KNKO610, File No. 29000-CD-P/ML-96); Waxahachie, TX (Call Sign KNKO610, File No. 29058-CD-P/ML-96); Coupland, TX (Call Sign KNKO610, File No. 32988-CD-P/ML-96); Georgetown, TX (Call Sign KNKO610, File No. 27328-CD-P/ML-96); Seguin, TX (Call Sign KNKO610, File No. 27314-CD-P/ML-96) and Walburg, TX (Call Sign KNKO610, File No. 33034-CD-P/ML-96).² However, those applications properly should not be considered mutually exclusive, and the Commission accordingly should reconsider and rescind their dismissal.

As Express has repeatedly pointed out in informal meetings with the staff concerning the processing of the applications at issue herein, the term A mutually exclusive is a term of art, and the Commission's order establishing the rules and procedures governing the A40-mile extension applications explicitly adopted a different definition of A mutually exclusive and a separate processing track to be used specifically for the A40-mile extension applications which

² The Order lists the Walburg application as being dismissed because it seeks spectrum previously assigned to another licant, rather than because it is mutually exclusive. Express believes that this classification likewise is in error in light of arguments concerning the reasons its remaining applications should not be deemed mutually exclusive. In any event, if necessary, the Walburg application can and should be severed from the remaining applications for which reconsideration is being sought.

incumbents were permitted to file.³

As specified in the *First Report & Order*, extension applications can be deemed mutually exclusive *only* if a co-channel application was filed within 60 days after the public notice accepting the extension application for filing. Thus, they cannot be deemed mutually exclusive with any pre-freeze backlogged applications, because the backlogged applications do not meet the explicit criteria established by the *First Report & Order* for being mutually exclusive with extension applications, *i.e.*, the backlogged applications were not filed on a frequency-specific co-channel basis as required by the *First Report & Order*, nor were they filed within 60 days after public notice of the acceptance of the extension applications for filing, as also required by the *First Report & Order*.

All of the Express applications at issue here are non-mutually exclusive because the conditions for mutual exclusivity established in the *First Report & Order* were not met. In turn, since they are non-mutually exclusive applications, the *Second Report & Order* dictates that they are entitled to be processed and granted.⁴

Moreover, out of an abundance of caution, each of Express applications was amended

³ Applications that meet this [40-mile co-channel] requirement will be placed on public notice and subject to competing applications within the applicable filing window. While we will accept initial applications as described above on incumbents, we will not limit eligibility to file competing applications once the incumbent's initial application is filed. *we will prevent any possible prejudice to parties with a potential interest in the channel other than the initial applicant. If a competing application is filed, the incumbent's initial application can be processed because it is unlikely that the spectrum issue has significant value to any other applicant. If a competing application is accepted for filing, we will treat both applications as mutually exclusive and will hold them in abeyance until the conclusion of this proceeding, and will be resolved in a manner consistent with the new rules.* Future Development of Paging Systems (First Report and Order), 11 FCC Rcd 70, 16583-4 at &26 (FCC 1996). (Emphasis added).

⁴ All pending mutually exclusive applications will be dismissed, including those filed under the interim rules. Non-mutually exclusive paging applications filed on or before July 31, 1996 will be processed. *Second Report & Order, supra*, (Emphasis added).

on April 28, 1997, to specify that it would accept any interference from any facility authorized by the Commission on 931.3125 MHz within 70 miles of Express= proposed facility as a result of the grant of applications filed prior to the Afreeze≅ imposed on February 8, 1996. The amendment further specified that Express would operate its proposed facility on a secondary, non-interfering basis to any such facility for which an application was filed prior to the freeze and authorized by the Commission on 931.3125 MHz within 70 miles of Express= proposed facility. Such undertakings are otherwise routinely accepted by the Commission to resolve mutually exclusive applications and should be deemed, without more, to have resolved in Express= favor any question as to whether its applications should be deemed mutually exclusive or not.

At the very least, Express is entitled to a ruling on these issues, so that it can pursue its right to have any adverse determination reviewed and reversed. Under any circumstance, therefore, threshold dismissal of Express' applications as mutually exclusive, as the Order does, is plainly improper and should be reconsidered and rescinded.

Respectfully submitted,

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