

ORIGINAL

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

RECEIVED

JAN 13 1999

To: The Chief, Commercial
Wireless Division

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CONSOLIDATED PETITION FOR RECONSIDERATION

Robert Kester, et al. ("Petitioners"),¹ herewith request, pursuant to Section 1.106 of the Commission's Rules, reconsideration of the actions taken in the *Order* ("*Order*") issued by the Commission in the above-referenced proceeding.² The Commission, through its *Order*, has dismissed the Petitioners ostensibly because they requested spectrum previously assigned to another licensee on an exclusive basis. This is erroneous. The Petitioners filed for frequencies in the 931-932 frequencies, not in the 929-930 MHz frequencies to which the Commission refers as the basis for the dismissal. Furthermore, any use by the Commission of a "chain-reaction" processing standard violates the Paperwork Reduction Act, and is being improperly applied to

¹ The 931 MHz paging applicants listed in the attached Exhibit One have all been dismissed in the instant *Order*, and thus, in the interests of conserving resources, constitute the parties filing this Consolidated Petition for Reconsideration.

² The date of public notice for the purpose of filing this Petition for Reconsideration is the release date, December 14, 1999. See 47 C.F.R. Section 1.4(b)(3). Consequently, this Petition for Reconsideration is timely filed.

DH

determine mutual exclusivity in the case of 931 MHz paging applicants. In support of this Petition for Reconsideration, the following is submitted.

I. Background

In its *Order*, the Commission dismissed pending paging applications for several reasons. Specifically, the Commission dismissed the pending paging applications of the Petitioners because the Petitioners requested "spectrum previously assigned to another licensee on an exclusive basis." ¶¶ 1 and 4.³ The authority cited in the accompanying footnote is *Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz*, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993). The Petitioners' applications all involve requests for spectrum in the 931-932 MHz band, not in the 929-930 MHz band.

IV. Compliance with the Paperwork Reduction Act of 1980.

The Paperwork Reduction Act of 1980 ("PRA") requires agencies to obtain approval from the Office of Management and Budget ("OMB") before imposing a new or revised information collection requirement.⁴ Proposed rules are submitted to OMB and may be approved and assigned an OMB control number prior to adoption and publication of the final rules.⁵ The final rules need only be submitted to OMB if they have been "substantively or materially"

³ These applications are found in Attachment C to the *Order*.

⁴ See 44 U.S.C. § 3507(a).

⁵ See C.F.R. § 1320.13(f).

modified after approval by OMB as proposed rules.⁶ The "public protection" provision of the PRA provides that "no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved...does not display a current control number assigned by the Director (of OMB).⁷

VI. Mutual Exclusivity Standard

The Commission has established a definition of mutual exclusivity for paging applications in its rules. The primary definition of mutual exclusivity is found in 47 C.F.R. Section 22.131, based on interference considerations:

Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the others under Commission rules governing the Public Mobile Services involved.

Traditionally, the Commission has imposed a "chain-reaction" principle to determine mutual exclusivity.⁸ However, the Commission's rules are designed to prevent the procedural problems caused by an indefinite "chain reaction".⁹ This "chain-reaction" principle is not specifically described in the Commission's rules.

The Commission implements its mutual exclusivity rule through the use of an algorithm designed for automatically granting or

⁶ See 5 C.F.R. § 1320.13(G).

⁷ 44 U.S.C. §3512.

⁸ See *Domestic Public Radio Services*, 38 RR 2d 363, 374 (1976).

⁹ *Id.*, at 375.

dismissing 931 MHz applications.¹⁰ The algorithm does not appear to incorporate the "chain reaction" processing principle traditionally used in the processing of paging applications.

VII. The FCC's Action Is Improper

The Commission's action is in error. The Petitioner's applications involve frequencies which are not in the same frequency band as those described in the Order which is the stated basis for the Petitioners' dismissal. In addition, the Commission gives no explanation for this discrepancy.

Furthermore, as noted above, the Paperwork Reduction Act of 1980 ("PRA") requires agencies to obtain approval from the Office of Management and Budget ("OMB") before imposing a new or revised information collection requirement. The "public protection" provision of the PRA provides that

"no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved...does not display a current control number assigned by the Director (of OMB)."

A prior Commission decision has interpreted the statute to hold that the "public protection" requirements of the Paperwork Act may be raised as a complete defense or bar at any time during the administrative process.¹¹

The Petitioners cite this statute as a defense to the use of the "chain-reaction" principle to the processing of its applications and any determination of mutual exclusivity with

¹⁰ A copy of the algorithm is attached in Exhibit One.

¹¹ *Portland Cellular Partnership*, 5 CR 540 (1996).

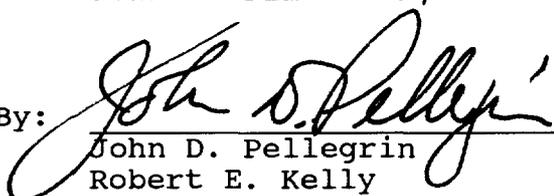
"spectrum previously assigned to another licensee on an exclusive basis" in the 929-930 MHz band. The Commission's rules only require studies within a certain geographic area on the desired frequencies.¹² The requirement that an applicant search beyond that area to determine if it is mutually exclusive using the "chain-reaction" principle prior to filing its application is an information collection requirement that cannot be condoned by the provision of the PRA just cited. The Commission must be barred from applying the "chain-reaction principle" in the determination of mutual exclusivity in the dismissal of the Petitioners' applications, which must be the case based on the meager facts provided in the Commission's decision.

Wherefore, the above premises considered, it is respectfully requested that the Commission reconsider its decision to dismiss Petitioners' applications referenced herein and reinstate them forthwith.

Respectfully submitted,

JOHN D. PELLEGRIN, CHARTERED

By:


John D. Pellegrin
Robert E. Kelly

Law Offices of John D. Pellegrin, Chartered
1140 Connecticut Avenue, N.W. - Suite 606
Washington, D.C. 20036
(202) 293-3831

Dated: January 13, 1999

¹² See, e.g., 47 C.F.R. §22.559.

Exhibit One

List of Petitioners' Applications

Carmelo Martinez	21468-CD-P/L-96
John Piskor	22406-CD-P/L-96
Robert Kester	22411-CD-P/L-96
John Piskor	22424-CD-P/L-96
John Piskor	22903-CD-P/L-96
James Bednark	21937-CD-P/L-97
James Bednark	21938-CD-P/L-97