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

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115
	)	
Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit The Concurrent Use of Transmitters in Common	)	CC Docket No. 94-46 RM 8367
	)	
Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the Public Land Mobile Service	)	CC Docket No. 93-116
	)	
Petition for Declaratory Ruling Regarding The Basic Exchange Telephone Radio Systems	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: April 4, 2000 Released: April 17, 2000

By the Commission:

A. BACKGROUND

1. In this *Memorandum Opinion and Order on Reconsideration* (*MO&O on Reconsideration*), the Commission disposes of 37 petitions for reconsideration (petitions) regarding various issues addressed in the *Part 22 Rewrite Order*.[1] We grant various petitions to the extent they seek reconsideration of our policy prohibiting the use of shared transmitters by Part 22 licensees. With respect to all other issues addressed, we dismiss or deny the petitions. Additionally, we dismiss a petition for declaratory ruling filed by Graceba Total Communications, Inc. (Graceba) regarding Basic Exchange Telephone Radio Systems (BETRS).[2]

B. DISCUSSION

2. Most of the issues raised on reconsideration have either been resolved in or rendered moot by subsequent proceedings. For example, several parties raised issues relating to site-by-site licensing of paging systems. These issues have been rendered moot by the transition to geographic area licensing in the

[1] Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd. 6513 (1994)(*Part 22 Rewrite Order*). The petitioners are listed in the attachment.

[2] Graceba Petition for Declaratory Ruling, filed December 19, 1994.

paging services.[3] Other licensing issues were addressed in or rendered moot by the Universal Licensing System Proceeding in which we streamlined our application and assignment and transfer processes for Part 22 licenses.[4] To the extent the issues have not been effectively addressed elsewhere, except as discussed below, the petitions raise a variety of minor issues involving procedural requirements and operational rules affecting Part 22 licensees. We find these arguments unpersuasive, and in many respects they only repeat arguments that we considered and rejected previously in this proceeding. Nothing in the record as it now stands warrants alteration of any decisions addressed in the petitions, except for the reversal of our policy regarding the use of shared transmitters by Part 22 licensees discussed below.

3. We note in particular that several petitioners seek reconsideration of the rule requiring cellular mobile transmitters to have a unique and unalterable Electronic Serial Number (ESN).[5] Petitioners argue generally that this rule unnecessarily restricts legitimate activities and that it is not the most effective method of combating fraud. Since the record in this proceeding was compiled in 1994, anti-fraud practices, technologies and the market for cellular services have changed considerably, and in addition, Congress has passed potentially relevant legislation.[6] We therefore find that the current record is not useful for evaluating the continued need for or appropriate form of the cellular ESN rule. We further conclude that nothing in the *Part 22 Rewrite Order* improperly adjudicated the rights of parties under the preexisting cellular system compatibility rule[7] in violation of the Administrative Procedure Act, and that nothing in our discussion of cellular ESNs was improperly based on undisclosed *ex parte* contacts.[8] We therefore deny the petitions relating to the cellular ESN rule. We will, however, review the cellular ESN rule as part of our upcoming biennial review of regulations affecting providers of telecommunications services.[9]

4. Several petitioners also seek reconsideration of the uncodified policy stated in Paragraph 71 of the *Part 22 Rewrite Order*,[10] which prohibits the use of shared transmitters by Part 22 licensees.[11] On

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[3] *See* In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd. 2732 (1997), *recon.*, 14 FCC Rcd. 10030 (1999) (*Paging Systems Reconsideration Order*).

[4] *See* Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, 13 FCC Rcd. 21027 (1998), *recon.*, 14 FCC Rcd. 11476 (1999); *see also, e.g.*, Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Rulemaking*, 13 FCC Rcd. 374 (1997) (addressing pre-grant construction issues); In the Matter of the Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd. 6293 (1998) (pro-forma assignments and transfers streamlined).

[5] 47 C.F.R. § 22.919.

[6] *See* Wireless Telephone Protection Act, Pub. L. No. 105-172, 112 Stat. 53 (1998).

[7] 47 C.F.R. § 22.915, now codified at 47 C.F.R. § 22.933.

[8] *See* C-Two-Plus, Inc. (C2+) Petition at 3-4; Reply of C2+ to CTIA Opposition/Comments at 3.

[9] *See* 47 U.S.C. § 161.

[10] *Part 22 Rewrite Order*, 9 FCC Rcd. at 6528, ¶ 71.

[11] *See, e.g*, Petitions filed by Celpage, Inc., CTIA and Metrocall, Inc.

January 10, 1995, before the *Part 22 Rewrite Order* became effective, the Commission stayed the policy prohibiting the use of shared transmitters.[12] In the *Part 22 Rewrite Order*, the Commission prohibited the use of shared transmitters because it was concerned about issues regarding the control and responsibility for these transmitters, and because it was concerned that outages of shared transmitters would cause broad service disruptions.[13] In the *Stay Order*, however, the Commission recognized that it had previously allowed dual licensing of Part 22 transmitters and was continuing to allow dual licensing in the Part 90 private paging services, and that its new policy could result in inconsistent treatment of similar services. In addition, the Commission noted that outages are more likely to be detected and corrected if a transmitter is used by multiple licensees.[14] The *Stay Order* has remained in effect for approximately five years. In light of the apparent lack of problems with the use of shared transmitters in the Part 22 and Part 90 services to date, we conclude that any disadvantages to permitting shared use are outweighed by the cost efficiencies to Part 22 licensees and potential cost savings to the public. Therefore, we grant the various petitions to the extent they seek reconsideration of this policy, lift the stay, and reverse the uncodified policy prohibiting the shared use of transmitters.

5. On December 19, 1994, Graceba filed a request for declaratory ruling (request) regarding Basic Exchange Telephone Radio Systems (BETRS). Graceba requests that the Commission specify the required grade of service in evaluating BETRS applications. We have dealt extensively with BETRS issues in the *Paging Systems Reconsideration Order*.[15] Therefore, pursuant to our discretion under section 1.2 of the Commission's rules,[16] we decline to issue a declaratory ruling and we dismiss Graceba's request.

C. PROCEDURAL MATTERS

6. Paperwork Reduction Act of 1995 Analysis. The policy changes adopted in this *MO&O on Reconsideration* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and impose no new or modified information collection requirements on the public.

7. Supplemental Final Regulatory Flexibility Certification. The Regulatory Flexibility Act of 1980, as amended (RFA)[17] requires that a final regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[18] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small

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[12] *See* Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 10 FCC Rcd. 4146 (*Stay Order*).

[13] *See Part 22 Rewrite Order*, 9 FCC Rcd. at 6528, ¶ 71.

[14] *See Stay Order*, 10 FCC Rcd. at 4149, ¶ 8.

[15] *See Paging Systems Reconsideration Order*, 14 FCC Rcd. at 10054-58, ¶ 28-33.

[16] 47 C.F.R. § 1.2.

[17] The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[18] 5 U.S.C. § 605(b).

governmental jurisdiction."[19] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[20] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[21] We certify that the policy change adopted in this *MO&O on Reconsideration* will not have a significant economic impact on a substantial number of small business entities because the previous policy was never enforced or codified in the Commission's rules.

D. ORDERING CLAUSES

8. IT IS THEREFORE ORDERED that, pursuant to sections 1, 4(i), 4(j) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i),154(j), and 405, and section 1.106, of the Commission's rules, 47 C.F.R. § 1.106, the petitions for reconsideration of the *Part 22 Rewrite Order* ARE GRANTED to the extent they seek reconsideration of the Commission's policy prohibiting the use of shared transmitters by Part 22 licensees, the *Stay Order* IS LIFTED, and the policy IS REVERSED.

9. IT IS FURTHER ORDERED that the petitions for reconsideration of the *Part 22 Rewrite Order* are in all other respects DISMISSED or DENIED.

10. IT IS FURTHER ORDERED that pursuant to sections 1, 4(i), and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i),154(j), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, the Petition for Declaratory Ruling filed by Graceba Total Communications, Inc. IS DISMISSED.

11. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration*, including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

12. For additional information concerning this matter, contact Don Johnson (202-418-7240), Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[19] 5 U.S.C. § 601(6).

[20] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[21] Small Business Act, 15 U.S.C. § 632.