

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

FILE ROOM

2001 MAR -2 P 3: 05

In the Matter of)
)
Revision of Part 22 and Part 90)
of the Commission's Rules to Facilitate)
Future Development of Paging Systems)
)
Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

WT Docket No. 96-18

PR Docket No. 93-253 ✓

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: February 15, 2001

Released: February 27, 2001

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order on Reconsideration (*Reconsideration MO&O*), we consider petitions for reconsideration and/or clarification of various aspects of the *Memorandum Opinion and Order on Reconsideration and Third Report and Order* previously issued in this proceeding.¹ We clarify one aspect of the *Third Report and Order* concerning interference protection afforded certain incumbent licensees, and we deny the other petitions.

II. BACKGROUND

2. In this proceeding, we have examined our paging regulations in view of the statutory objective of regulatory symmetry for all commercial mobile radio services (CMRS) under the Omnibus Budget Reconciliation Act of 1993.² In our *Notice of Proposed Rulemaking*, we proposed a transition from site-by-site licensing to geographic area licensing and the adoption of competitive bidding rules for mutually exclusive applications in order to provide for the rapid

¹ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030 (1999) (*Third Report and Order*). Appendix A lists the names of those who filed petitions, oppositions, replies to oppositions, comments, reply comments and *ex parte* filings.

² Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b)(2)(a), (b), 107 Stat. 312 (largely codified at 47 C.F.R. § 332 *et seq.*).

assignment of available channels to applicants who would expedite service to the public.³ In so doing, we sought to establish a comprehensive and consistent regulatory design that would simplify and streamline licensing procedures and provide a flexible operating environment for paging services. Our *First Report and Order* adopted interim rules governing the licensing of paging systems during the pendency of this proceeding.⁴ In the *Second Report and Order and Further Notice of Proposed Rulemaking*, we adopted rules governing geographic area licensing for exclusive channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz and 931-932 MHz bands for paging, and established competitive bidding procedures for granting mutually exclusive applications for non-nationwide geographic area licenses.⁵ We found that geographic area licensing would provide flexibility for licensees and ease of administration for the Commission, facilitate further build-out of wide-area systems and enable paging operators to act promptly to meet their customers' requirements. We also sought comment on a number of issues, including the partitioning of paging licenses.⁶

3. On May 24, 1999, we released the *Third Report and Order*, which made certain modifications to rules governing geographic area licensing of paging channels and to the competitive bidding procedures for auctioning mutually exclusive applications for these licenses. We clarified our prior decision concerning channel sharing by non-exclusive incumbent licensees with nationwide geographic area licensees,⁷ increased the level of bidding credits for small businesses participating in paging auctions⁸ and amended our rules to allow geographic area licensees to use an FCC-recognized service area to partition their licenses.⁹ We also found that when a non-geographic area incumbent licensee permanently discontinues service to an area, that area will automatically revert to the geographic area licensee.¹⁰

4. Three parties filed for reconsideration and/or clarification regarding various portions of the *Third Report and Order*. Blooston, Mordkofsky, Jackson and Dickens (Blooston) seeks

³ See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3113, ¶ 21, 3109, ¶ 1 (1996) (*Notice*).

⁴ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *First Report and Order*, 11 FCC Rcd 16570, *modified*, *Order on Reconsideration of First Report and Order*, 11 FCC Rcd 7409 (1996).

⁵ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2739, ¶ 6 (1997) (*Second Report and Order*).

⁶ *Id.* at 2821-23, ¶¶ 203-211.

⁷ *Third Report and Order*, 14 FCC Rcd at 10062-3, ¶ 48.

⁸ *Id.* at 10091, ¶ 113.

⁹ *Id.* at 10129.

¹⁰ *Id.* at 10055-56, ¶¶ 34-35. Petitions to review the *Third Report and Order* and *Second Report and Order* were denied in *Benkelman Telephone Co. v. FCC*, 220 F.3d 601 (D.C. Cir. 2000).

clarification that 929 MHz paging licensees that achieved exclusivity prior to the adoption of the paging auction rules but subsequently failed to maintain the minimum number of transmitters required under the former rules will not thereby lose their exclusivity.¹¹ Morris Communications, Inc. (Morris) requests that the Commission establish an additional tier of small businesses eligible for an auctions bidding credit.¹² Rand McNally & Company (Rand McNally) requests that the Commission amend its rules either to eliminate the ability of paging licensees to partition along the “boundaries of an FCC-recognized service area” or to specify that the use of Rand McNally’s Major Trading Area (MTA) or Basic Trading Area (BTA) listings is not permitted for partitioning in the absence of an express license agreement with Rand McNally.¹³

5. In this *Reconsideration MO&O*, we clarify that a licensee who achieved exclusivity prior to the adoption of the *Second Report and Order* did not lose its exclusivity as a result of failing to maintain the previously-required minimum number of transmitters after the adoption of the *Second Report and Order*. We deny the petitions of Morris and Rand McNally.

III. DISCUSSION

A. Channel Exclusivity

6. In 1993, the Commission established a mechanism for exclusive licensing on thirty-five of the forty 929-930 MHz channels.¹⁴ The *929 MHz Paging Exclusivity Order* allowed licensees whose systems operated on these channels to earn exclusivity on a local, regional or nationwide basis by constructing multi-transmitter systems that met certain minimum criteria.¹⁵ For example, an applicant for paging stations in the 929-930 MHz band was eligible for local channel exclusivity if, among other requirements, the applicant constructed and operated a local paging system that consisted of at least six contiguous transmitters.¹⁶ In the *Second Report and Order*, the Commission provided that geographic area licensees must provide co-channel protection to all incumbent licensees.¹⁷ In the *Third Report and Order*, we clarified that non-

¹¹ Blooston, Mordkofsky, Jackson and Dickens Petition for Clarification and/or Reconsideration, filed July 26, 1999 (Blooston Petition); Blooston, Mordkofsky, Jackson and Dickens Reply, filed September 9, 1999 (Blooston Reply). The Personal Communications Industry Association (PCIA) filed an opposition to the Blooston Petition. Personal Communications Industry Association Opposition to Petition for Clarification and/or Reconsideration, filed August 25, 1999 (PCIA Opposition).

¹² Morris Communications Petition for Partial Reconsideration, filed July 26, 1999 (Morris Petition). There were no oppositions or comments filed in response to the Morris Petition.

¹³ Petition for Reconsideration, filed July 23, 1999, by Rand McNally (Rand McNally Petition). There were no oppositions or comments filed in response to the Rand McNally Petition.

¹⁴ Amendment of the Commission’s Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, *Report and Order*, 8 FCC Rcd 8318 (1993) (*929 MHz Paging Exclusivity Order*).

¹⁵ *Id.* at 8321-23, ¶¶ 9-15.

¹⁶ *Id.* at 8321, ¶ 9; 47 C.F.R. § 90.495(a)(1)(i) (1996).

¹⁷ *Second Report and Order*, 12 FCC Rcd at 2769, ¶ 69.

exclusive incumbent licensees on the thirty-five exclusive 929 MHz channels will continue to operate under the same arrangements established with the exclusive incumbent licensees and other non-exclusive incumbent licensees prior to the adoption of the *Second Report and Order*. We further clarified that nationwide and geographic area licensees have the right to share with non-exclusive incumbent licensees on a non-interfering basis.¹⁸ Section 22.503(i) of our rules was amended to reflect those clarifications.¹⁹

7. Blooston now asks the Commission to clarify that a non-geographic area licensee that achieved exclusivity prior to the adoption of the paging auction rules but, after the adoption of those rules, failed to maintain the minimum number of transmitters that had been required to achieve exclusivity does not thereby lose its exclusive status. Blooston further asks the Commission to clarify that such licensee accordingly would not be considered a non-exclusive incumbent licensee and would not be required to share with nationwide and geographic area licensees on a non-interfering basis.²⁰ We provide clarification to the extent discussed below.

8. Section 22.503(i) of our rules provides that all facilities constructed and operated pursuant to a paging geographic area authorization must provide co-channel interference protection to all authorized co-channel facilities of exclusive licensees within the paging geographic area.²¹ The rule further provides that non-exclusive licensees on the thirty-five exclusive 929 MHz channels are not entitled to exclusive status and that geographic area licensees have the right to share with these non-exclusive licensees on a non-interfering basis.²² In establishing these provisions, it was our intent to recognize the continued exclusivity of licensees who were exclusive incumbents prior to the adoption of the *Second Report and Order*. It is our view that the public interest would not be served by withdrawing exclusivity rights that had been earned by these licensees. Moreover, maintaining the exclusive status of incumbents that previously earned exclusivity is consistent with our clarification in the *Third Report and Order* that maintained the non-exclusive status of non-exclusive incumbents with respect to sharing with geographic area licensees.²³ Therefore, we clarify in this *Reconsideration MO&O* that a licensee who achieved exclusivity prior to the adoption of the *Second Report and Order* did not lose its exclusivity as a result of failing to maintain the previously-required minimum number of transmitters after the adoption of the *Second Report and Order*. Such a licensee will not be subject to sharing with nationwide and geographic area licensees as a non-exclusive

¹⁸ *Third Report and Order*, 14 FCC Rcd at 10062, ¶ 48.

¹⁹ See 47 C.F.R. § 22.503(i).

²⁰ See Blooston Reply at 1-4. The exact scope of relief being sought by Blooston was not clear in its Petition. In its Reply to the PCIA Opposition, Blooston clarified and narrowed the scope of its request. In this *Reconsideration MO&O*, we address Blooston's arguments only to the extent that they relate to Blooston's request as clarified and narrowed by its Reply.

²¹ 47 C.F.R. § 22.503(i).

²² *Id.*

²³ See *Third Report and Order*, 14 FCC Rcd at 10061-62, ¶¶ 47-48.

incumbent.

9. We note, however, that the retained exclusivity rights, as clarified above, remain subject to our determination in the *Third Report and Order* that where an incumbent permanently discontinues operations at a given site, the area no longer served automatically reverts to the geographic area licensee.²⁴ As we pointed out in the *Third Report and Order*, reversion is in the public interest because it promotes the use of the spectrum.²⁵

B. Bidding Credits

10. In the *Second Report and Order*, we adopted bidding credits for two tiers of small businesses and provided for installment payment financing in connection with paging auctions.²⁶ In the *Third Report and Order*, we retained our two-tiered small business definition. However, we eliminated installment payments and, to balance the impact on small businesses, increased the bidding credits.²⁷ As a result, an entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$3 million qualifies for a 35 percent bidding credit. An entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$15 million qualifies for a 25 percent bidding credit.²⁸

11. Morris requests that the Commission establish a third tier of small businesses eligible for a bidding credit, to permit an entity with average gross revenues for the preceding three years not in excess of \$40 million to be eligible for a 15 percent bidding credit. In the alternative, Morris requests that the current gross revenues threshold to qualify for a 25 percent bidding credit be raised from \$15 million to \$40 million. Noting that the Commission has used a small business definition based on a \$40 million gross revenues threshold for both narrowband and broadband PCS, Morris asserts that establishing such a definition for paging would further the Commission's goal of regulatory parity among CMRS. Morris also claims that additional small business benefits are particularly appropriate for paging services because the paging industry has very low profit margins.²⁹

12. We are not persuaded that we should change the small business definitions or bidding credits established in our previous orders. In the *Third Report and Order*, we affirmed that the bidding credits adopted in this proceeding achieve a reasonable balance between the positions of those supporting bidding credits in larger amounts and those opposing the use of any

²⁴ *Id.* at 10055-56, ¶ 35.

²⁵ *Id.*

²⁶ *Second Report and Order*, 12 FCC Rcd at 2811, ¶¶ 178-79, 2813, ¶ 184.

²⁷ *Third Report and Order*, 14 FCC Rcd at 10090-91, ¶¶ 111, 113.

²⁸ *Id.* at 10091, ¶ 113.

²⁹ See Morris Petition at 2-4.

bidding credits.³⁰ In addition, we have considered the particular nature of the paging industry in establishing our definitions of small businesses eligible for bidding credits.³¹ Our *Notice* requested comment on the capital requirements and other characteristics of the service,³² and we expressly addressed the need to provide smaller businesses with an opportunity to compete against larger bidders, the difficulties smaller businesses have in accessing capital, and their differing business strategies.³³ Moreover, we find that there is no need to alter the small business definitions or bidding credits for paging, even if they differ from the bidding credits for other services such as broadband and narrowband PCS, because we have conducted a paging auction within the past year in which we used the bidding credits adopted in the *Third Report and Order* and small businesses were very successful in that auction. Indeed, bidders claiming small business status won 440 of 985 licenses in the 929 and 931 MHz paging auction that closed on March 2, 2000 (Auction No. 26).³⁴ We also note that Morris, which did not seek a stay of the auction and which qualified as a small business in Auction 26, won 18 licenses in that auction.³⁵ We find that the successful performance of small businesses in Auction 26 supports the conclusion that our current small business definitions and bidding credits are appropriate for future paging auctions. Further, as Morris is the only party to raise this issue, there does not appear to be a widespread belief in the paging industry that the existing small business definitions need to be changed as Morris requests. In sum, Morris fails to persuade us that our small business definitions or bidding credits for paging should be adjusted, and we therefore deny Morris's petition for partial reconsideration.

C. Partitioning Boundaries in Section 22.513(b) of Our Rules

13. In the *Third Report and Order*, we replaced the Rand McNally Major Trading Areas (MTAs) with Major Economic Areas (MEAs) for geographic licensing of the 929-931 MHz band, and we affirmed our decision to award licenses for Economic Areas (EAs), as opposed to the Rand McNally Basic Trading Areas (BTAs), for paging systems operating in the lower paging bands.³⁶ We provided that geographic paging licenses may be partitioned based on any boundaries defined by the parties.³⁷ Section 22.513(b) of our rules was amended to provide, in

³⁰ *Third Report and Order*, 14 FCC Rcd at 10091, ¶ 112. See also *Second Report and Order*, 12 FCC Rcd at 2811, ¶ 179.

³¹ Our rules provide that “[t]he Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.” 47 C.F.R. § 1.2110(c)(1).

³² *Notice*, 11 FCC Rcd at 3133-34, ¶¶ 126-28.

³³ *Second Report and Order*, 12 FCC Rcd at 2811, ¶ 178-79.

³⁴ See *Public Notice*, 929 and 931 MHz Paging Auction Closes; Winning Bidders of 985 Licenses Announced, 15 FCC Rcd 4858 (2000), Attachment A.

³⁵ *Id.*

³⁶ *Third Report and Order*, 14 FCC Rcd at 10044, ¶ 17, 10045-46, ¶ 20.

³⁷ *Id.* at 10101, ¶ 133.

pertinent part, that:

[t]he partitioned service area shall be defined by 120 sets of geographic coordinates at points at every 3 degrees azimuth from a point within the partitioned service area along the partitioned service area boundary unless either an FCC-recognized service area is used (*e.g.*, MEA or EA) or county lines are followed.³⁸

14. In its petition for reconsideration, Rand McNally requests that the Commission either amend section 22.513(b) to eliminate the ability of paging licensees to partition along the “boundaries of an FCC-recognized service area” or to specify that the use of MTA or BTA listings is not permitted for partitioning in the absence of an express license agreement with Rand McNally permitting such use.³⁹ Rand McNally asserts that even though the rule does not specify MTA or BTA listings, it continues to encourage Commission licensees to employ MTA or BTA listings.⁴⁰ Rand McNally further claims that the Commission would be obligated under the rule to grant a license with an MTA-defined boundary, which would infringe upon Rand McNally’s copyright interests.⁴¹

15. We previously have recognized in this proceeding that Rand McNally is the copyright owner of the MTA/BTA Listings.⁴² In the *Third Report and Order*, we acknowledged that economic benefits will accrue from licensing based on a designation that is in the public domain,⁴³ and we replaced Rand McNally’s MTA listings with MEAs for geographic area licensing. Consistent with these determinations, section 22.513(b) of our rules contains no reference to partitioning on the basis of MTAs or BTAs.⁴⁴ We disagree with Rand McNally’s contention that even in the absence of such a reference, the rule somehow encourages licensees to employ MTA or BTA listings. To the contrary, we already have stated in this proceeding that a paging authorization grantee who does not obtain a copyright license (either through a blanket license agreement or some other arrangement) from Rand McNally for use of the copyrighted material may not rely on the grant of a Commission authorization as a defense to any claim of

³⁸ 47 C.F.R. § 22.513(b).

³⁹ Rand McNally Petition at 1.

⁴⁰ *Id.* at 2.

⁴¹ *Id.*

⁴² *Second Report and Order*, 12 FCC Rcd at 2735, ¶ 2 n.3.

⁴³ *Third Report and Order*, 14 FCC Rcd at 10044, ¶ 17.

⁴⁴ *Cf.* 47 C.F.R. § 90.1019(b) (“[W]here an FCC-recognized service area or county lines are utilized [to partition in the 220 MHz service], applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.”). See Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Memorandum Opinion and Order*, 15 FCC Rcd 13924, 13927, ¶ 8 (2000) (dismissing Rand McNally’s petition for reconsideration as moot because rule had been amended to remove reference to partitioning by MTAs and BTAs).

copyright infringement brought by Rand McNally against such a grantee.⁴⁵ Furthermore, the Commission need not use the MTA or BTA designations in granting partitioned licenses in this service, regardless of whether the applicant uses them, but may instead reference county line boundaries, as allowed by the rules. In light of these considerations, we see no need to amend section 22.513(b) of our rules, and we therefore deny Rand McNally's petition for reconsideration.

IV. PROCEDURAL MATTERS

A. REGULATORY FLEXIBILITY ACT

16. As required by the Regulatory Flexibility Act (RFA),⁴⁶ the Commission issued a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) and a Final Regulatory Flexibility Analysis (FRFA) in the *Third Report and Order*.⁴⁷ We received no petitions for reconsideration in direct response to those analyses. In this *Reconsideration MO&O*, we are not promulgating new rules or revising existing rules, and our action does not affect the previous analyses.

17. Although no RFA analysis or certification is required in this *Reconsideration MO&O*, we take this opportunity to discuss our disposition of a reconsideration petition concerning small business size standards. In the *Third Report and Order*, we determined that an entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$3 million will qualify for a 35 percent bidding credit in our paging auctions.⁴⁸ In addition, an entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$15 million will qualify for a 25 percent bidding credit.⁴⁹ In December 1998, the Small Business Administration approved our two-tiered small business size standards.⁵⁰ In this *Reconsideration MO&O*, we deny a petition for reconsideration requesting that we establish a third tier of small businesses eligible for a bidding credit, to permit an entity with average gross revenues for the preceding three years not in excess of \$40 million to be eligible for a 15 percent credit.⁵¹ We also deny the petitioner's alternative request that the threshold to qualify for a 25 percent bidding credit be raised from \$15 million to \$40 million. In denying both requests, we explain that we have

⁴⁵ *Second Report and Order*, 12 FCC Rcd at 2735-36, ¶ 2 n.3.

⁴⁶ See 5 U.S.C. § 604. 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.

⁴⁷ *Third Report and Order*, 14 FCC Rcd at 10131 app. C, 10139 app. D.

⁴⁸ *Id.* at 10091, ¶ 113.

⁴⁹ *Id.*

⁵⁰ See *id.* at 10085 n.346.

⁵¹ Morris Petition at 2-4.

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considered the particular nature of the paging industry in establishing our definitions of small businesses eligible for bidding credits. We also find that there is no need to alter the small business definitions or bidding credits for paging because we have conducted a paging auction within the past year in which we used the bidding credits adopted in the *Third Report and Order* and small businesses were very successful in that auction. We find that the successful performance of small businesses in Auction 26 supports the conclusion that our current small business definitions and bidding credits are appropriate for future paging auctions. Finally, we note that, as this petitioner is the only party to raise this issue, there does not appear to be a widespread belief in the paging industry that the existing small business definitions need to be changed in the manner requested.⁵²

B. PAPERWORK REDUCTION ACT

18. This *Reconsideration MO&O* contains no new or modified information collections that are subject to the Paperwork Reduction Act of 1995, Public Law 104-13.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Clarification and/or Reconsideration filed July 26, 1999 by Blooston, Mordkofsky, Jackson and Dickens, as clarified by its Reply filed September 9, 1999, IS GRANTED to the extent provided herein.

20. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Morris Communications Petition for Partial Reconsideration filed July 26, 1999 and the Petition for Reconsideration of Rand McNally & Company filed July 23, 1999 ARE DENIED.

21. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

⁵² See *supra* ¶ 12.

APPENDIX A

PETITIONS FOR RECONSIDERATION

Morris Communications, Inc. (Morris)
Rand McNally & Company (Rand McNally)
Blooston, Mordkofsky, Jackson and Dickens (Blooston)

OPPOSITIONS TO PETITIONS

Personal Communications Industry Association (PCIA)

REPLIES TO OPPOSITIONS

Blooston

***EX PARTE* FILINGS**

The Rural Telecommunications Group (RTG)
Organization for the Promotion and Advancement of Small Telecommunications Companies
(OPASTCO)