

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Year 2000 Biennial Regulatory Review —) WT Docket No. 01-108
Amendment of Part 22 of the Commission’s)
Rules to Modify or Eliminate Outdated Rules)
Affecting the Cellular Radiotelephone Service)
and other Commercial Mobile Radio Services)

To: The Commission

PETITION FOR LIMITED RECONSIDERATION

Dobson Communications Corporation (“Dobson”)¹ hereby petitions for limited reconsideration of one part of the Commission’s decisions in the Report and Order (“Order”) adopted in the above-referenced proceeding.² Dobson believes that the *Order* significantly and appropriately eliminates many rules rendered unnecessary with the passage of time and the development of the cellular industry. However, for the reasons discussed below, the Commission should reconsider its decision not to amend its rules governing the extension of service into neighboring “unserved areas,” and, in particular, its failure to consider and adopt Dobson’s

¹ Dobson, through its subsidiaries, is the licensee or manager in over sixty cellular markets that cover primarily rural and suburban areas. As such, Dobson is quite familiar with the intricacies of the Commission’s cellular licensing scheme that has its beginnings in the early 1980s. Dobson filed both Comments (on July 2, 2001) and Reply Comments (on August 1, 2001) in response to the *Notice of Proposed Rulemaking* in this proceeding. *Year 2000 Biennial Regulatory Review — Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, *Notice of Proposed Rulemaking*, 16 FCC Rcd 11,169 (2001).

² *Year 2000 Biennial Regulatory Review — Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, WT Docket No. 01-108, *Report and Order*, 17 FCC Rcd 18,401 (2002).

proposal to provide cellular carriers with the option of extending service area boundaries into unserved areas on a secondary basis.

In its Comments in this proceeding, Dobson noted that most cellular markets are now almost completely built out, there are six nationwide or nearly nationwide CMRS operators, and 91% of the population has access to three or more CMRS providers; as a result, there is no longer any need for a separate cellular “unserved area” licensing process in order to assure that the demand for wireless services in these fringe areas of any particular market are being satisfied.³ Dobson explained how the maturity of the cellular industry and the coverage provided throughout the nation resulted in the existence of many small, irregularly shaped pockets of unserved areas at the periphery of most Cellular Geographic Service Areas (CGSAs). The existence of these types of unserved areas, and the regulatory scheme created for licensing them, has created a significant regulatory barrier for cellular licensees to improve coverage in their licensed areas that is not experienced by other CMRS providers.

Specifically, the existence of small, unclaimed, unserved areas in between a licensee’s CGSA and the cellular market boundaries or CGSA of neighboring licensees regularly imposes filing obligations (and delays in the introduction of new coverage) when Dobson desires or needs to make engineering modifications to its CGSA-defining cell sites in order to improve existing coverage within the CGSA. Indeed, where changes designed to improve cellular coverage to authorized markets inadvertently and unintentionally result in small incursions into unserved area, Dobson (like other cellular carriers but unlike PCS providers) must file a major modification application, accompanied by detailed engineering information, exhibits, and maps, and then wait approximately 60-90 days for the application to be accepted for filing, placed on

³ See Dobson Comments at 3.

public notice for 30 days, and be granted (assuming, as is typically the case in these types of situations, that no petition to deny or competing application is filed).

Other commenters noted similar reasons for streamlining the unserved area rules,⁴ and proposed new approaches that would constitute a complete overhaul of the unserved area process.⁵ Dobson suggested a more modest and easily implemented approach.

To alleviate this burden where the primary purpose of the design changes are the improvement of service to authorized areas, Dobson proposed that licensees should be permitted to extend into unserved areas of less than 50 square miles operating on a secondary, non-interfering basis to any licensee that might be authorized to cover the area in the future. Such extensions could be implemented without the need to make any further filings.⁶

There was broad support, and no opposition, for changing the current approach to authorizing service to cellular “unserved areas.” Nevertheless, the Commission rejected all of

⁴ Cingular Wireless LLC (“Cingular”) noted that the cellular market has matured sufficiently, the FCC’s rules do not contain similar procedures for other CMRS providers, most unserved areas of any value have already been licensed, unserved area applications are rarely contested, and the current process is administratively inefficient. Cingular Comments at 23-25. Western Wireless Corporation (“Western”) remarked that virtually all urban and suburban areas are covered, as are many rural areas, and thus that the current site-by-site licensing approach is now an inefficient process to extend coverage to remaining unserved areas, and that adoption of streamlined procedures would decrease administrative burdens on both licensees and the FCC, benefit residents of isolated rural communities not now receiving cellular service, and create regulatory parity. Western Comments at 8-9.

⁵ Cingular and Western suggested that the Commission permanently assign the rights to any unserved areas of fifty square miles or less in an RSA or MSA to the initial licensee for the relevant frequency block in the market, thereby allowing for SAB extensions into such areas without agency approval. For unserved areas greater than fifty square miles, Cingular and Western further recommended that the Commission subject these areas to a one-time auction. *See* Cingular Comments at 24; Western Comments at 6-7. Dobson supported these approaches as similarly viable alternatives. *See* Dobson Reply Comments at 2-3.

⁶ *See* Dobson Comments at 4-5. Dobson also suggested that this opportunity should be limited to extensions into markets for which the five-year build-out period has expired.

the proposals made by the responding parties and left the current burdensome regime in place.⁷

While Dobson also believes the Commission should have, and could have, adopted the broader proposals of Cingular and Western, Dobson is particularly concerned by, and is therefore filing solely to request reconsideration of, the FCC's failure to accept, or even discuss, Dobson's "secondary authority" proposal. By summarily rejecting Dobson's proposal without advancing any reasons for doing so, the Commission failed to follow the standard it has established under Section 11 of the Communications Act⁸ for the biennial regulatory review process, as well as the fundamental requirements for reasoned decision-making. No less significantly in light of the Commission's new rural service-oriented initiatives, Dobson's proposal advances and improves service to rural areas and is therefore worthy of adoption on reconsideration.

I. The Commission Failed to Meet its Obligations Under Section 11 of the Communications Act and Did Not Exercise Reasoned Decision-Making in Rejecting Dobson's Proposal.

In its discussion of "Overhaul of the Unserved Area Rules,"⁹ the Commission acknowledged the several proposals advocating changes to the presently burdensome unserved area filing requirements unique to the Cellular Radiotelephone Service, but rejected them all: "[g]iven that so few unserved area applications are filed with the Commission today and are processed quickly, we question whether the burden on all licensees of a major overhaul at this point warrants any corresponding benefits."¹⁰ The Commission further justified its decision to keep the existing regulations in place by noting that "[w]hile we applaud the commenters' initiative in recommending a significant overhaul of the cellular unserved licensing process, the

⁷ See *Order* at 18,439.

⁸ 47 U.S.C. § 161.

⁹ *Order* at 18,438-40 (paras. 76-82).

¹⁰ *Id.* at 18,439.

suggestions made by commenters constitute a fundamental change to our cellular service licensing model, and, as such, are beyond the scope of this proceeding.”¹¹

The Section 11 biennial review is purposed on the agency analyzing its regulations and removing those that may no longer be necessary in the public interest. Interpreting the requirements of Section 11, the Commission stated that “in making the determination whether a rule remains ‘necessary’ in the public interest once meaningful economic competition exists, the Commission must consider whether the concerns that led to the rule or the rule’s original purposes may be achieved without the rule or with a modified rule.”¹² Dobson submits that such an analysis was not made on the “unserved area” licensing rules in the *Order*, and that on reconsideration the Commission will find that Dobson’s proposal meets the Section 11 standard and should be implemented.

First, and foremost, there is nothing in the Commission’s discussion of the issues suggesting that it analyzed Dobson’s proposal and affirmatively determined that the original purposes for the unserved areas rules could not be achieved by permitting extensions into unserved area on a secondary basis. To the contrary, the few reasons advanced by the Commission in the *Order* appear aimed only at the far-reaching proposals advanced by other commenters.¹³ The Commission simply lumped together Dobson’s and the other commenters’

¹¹ *Id.*

¹² *Id.* at 18,404 (emphasis added). The Commission also explained that “in the context of section 202(h) of the Communications Act, the U.S. Court of Appeals for the D.C. Circuit found that we are not limited to the original purpose of a rule when determining whether or not it remains necessary.” *Id.* at n. 16.

¹³ As examples, the Commission made the following statements throughout its analysis, none of which are relevant to Dobson’s proposal: “While we applaud the commenters’ initiative in recommending a significant overhaul of the cellular unserved licensing process, the suggestions made by commenters constitute a fundamental change to our cellular service licensing model, and, as such, are beyond the scope of this proceeding . . . In considering the wisdom of making

proposals into one section, and summarily dismissed Dobson's proposal without any particular elaboration or explanation.¹⁴

The failure to consider Dobson's proposal in light of its statutory obligations under Section 11 alone warrants reconsideration. Of no less import, the Commission's summary rejection of Dobson's proposal also does not comport with reasoned decision-making and established principles of administrative law. The FCC "'must cogently explain why it has exercised its discretion in a given manner' and that explanation must be 'sufficient to enable [one] to conclude that the [agency's action] was the product of reasoned decision making.'"¹⁵ Furthermore, "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public."¹⁶ In the *Order*, the Commission simply mentioned Dobson's proposal, but completely omitted any discussion whatsoever as to its basis for choosing

significant changes within the cellular unserved licensing context . . . the recommended approach would require detailed analysis of the licensing history of each market." *Order* at 18,439-40 (*emphasis added*). The FCC could not possibly have been addressing Dobson's comments because, by contrast with those advanced by Cingular and Western, Dobson's proposal does not amount to any "significant" or "fundamental" change to the cellular rules.

¹⁴ The omission of any consideration of Dobson's proposal is even more pronounced given that under Dobson's approach, the existing unserved area rules would remain intact for licensees who desired to claim such areas within their CGSAs, and would simply add an option for licensees for whom the coverage into unserved areas was incidental to the primary purpose of serving their existing authorized territories. Simply stated, the change is more easily analyzed as compared to the "fundamental" and "major" changes proposed by Cingular and Western.

¹⁵ *U.S. Telecom. Ass'n v. FCC*, 227 F.3d 450, 460 (D.C. Cir. 2000) (quoting *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1491 (D.C. Cir. 1995) and *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48, 52 (1983)). In this case, the court found that by requiring carriers to implement certain FBI "punch list" capabilities, the FCC "simply concluded, with neither analysis nor explanation, that each capability is required by CALEA." *Id.* Accordingly, the reviewing court could not determine whether the punch list capability requirements are "the product of reasoned decision making." *Id.*

¹⁶ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (per curiam) (footnote omitted) (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-394 (D.C. Cir. 1973)).

not to adopt rules which would permit secondary operations in unserved areas. Accordingly, the Commission has provided no basis for one to conclude that its rejection of Dobson's proposal was the product of "reasoned decision making," nor given proper attention to Dobson's fully-developed and cogent comments on this point.

II. Permitting Extensions Into Unserved Area on a Secondary Basis Will Promote Service to Rural Areas.

As noted above and fully explained by Dobson and other commenters, the current unserved area process is outdated, unnecessarily burdensome, and contrary to the interests of regulatory parity. Indeed, the reason that the FCC might conclude that "so few unserved area applications are filed with the Commission today and are processed quickly"¹⁷ is because the current regulatory requirements discourage licensees from making network changes in the interest of improving or expanding service when such efforts would result in an incursion into unserved areas. The fact that any incursion into unserved area, no matter how small and/or irregularly shaped, requires licensees to go through the extensive application process acts as a strong deterrent for actually implementing such changes; this is particularly true when the carrier has no immediate business or commercial purpose for covering the "unserved area."

The rule has a particularly negative effect on cellular coverage in rural areas. Since virtually all remaining unserved areas are "rural" in nature,¹⁸ the current unserved area rules actually act as a disincentive to improving cellular services in the fringe rural areas of a market

¹⁷ See *supra* note 10.

¹⁸ Market forces have already resulted in the licensing of any sufficiently populated areas, leaving either small irregularly shaped unserved areas or areas that are eminently "rural," and in most cases scarcely populated. See Dobson Comments at 6.

where demand may exist,¹⁹ and are thus contrary to the goals the Commission is seeking to achieve in its several initiatives to promote wireless service to rural America.²⁰ Even worse, it provides these disincentives on a discriminatory basis to other CMRS services, which have no such impediments to expansion.

There is no doubt that adoption of the rule changes proposed by Dobson would remove a regulatory barrier to expanding cellular coverage into rural portions of the country. At least if licensees could make changes to their network that might minimally expand into unserved area on a secondary basis, without the need for preparing and filing unserved area applications, and waiting the 60-90 days for the Commission to process and grant such applications, carriers would be more likely to initiate such operations; those carriers who ultimately desired interference and customer capture protection in these areas would have the additional option of filing for a primary license for those unserved area as their business needs may dictate.

In its rural-focused *NOI*, the Commission seeks to “broaden our understanding of the effect our current policies have had on the availability of spectrum-based services in rural America.”²¹ Indeed, the Commission questions in the *NOI* whether the current unserved area licensing process facilitates service in rural areas, and asks, reminiscent of the options already offered by cellular carriers in this proceeding, if it should “amend the application filing process

¹⁹ See Western Comments at 3 (“People living and working in the parts of rural America not currently receiving cellular service are disserved by the rules that place obstacles in the way of carriers seeking to extend service beyond existing boundaries.”)

²⁰ See, e.g., FCC News Release, “FCC Asks for Information on Wireless Services in Rural Areas” (rel. Dec. 11, 2002); *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, WT Docket No. 02-381, *Notice of Inquiry*, FCC 02-325 (rel. Dec. 20, 2002) (“*NOI*”).

²¹ *NOI* at para. 11.

for cellular unserved areas to further encourage service providers to operate in rural areas?"²²

Dobson submits that the matters raised in this *Petition* already provide a response to this inquiry, and that grant of the *Petition* would present an immediate opportunity for the Commission to accomplish some of the goals it has established in the *NOI*.

CONCLUSION

By granting this *Petition*, the FCC would satisfy its obligations under Section 11 of the Communications Act with regard to a regulatory requirement that no longer satisfies the public interest. Furthermore, the FCC can advance its goal to promote wireless services to rural areas by adopting Dobson's proposal to permit expanded operations into unserved area on a secondary basis. Dobson therefore urges limited reconsideration of the *Order* to the extent discussed herein.

Respectfully submitted,

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²² *Id.* at paras. 23-24.