

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

In the Matter of)	
)	
Petition for Rulemaking to Amend)	RM No. 11355
Rule Section 22.901(b) to Extend)	
Analog Sunset Date)	
)	
Sunset of the Requirement that Cellular)	WT Docket No. 01-108
Systems Maintain Analog Transmission)	
Capacity through February 18, 2008,)	
Rule Section 22.901(b))	

To: The Commission

OPPOSITION OF AICC

The Alarm Industry Communications Committee (“AICC”) on behalf of its constituent members (hereinafter collectively the “Petitioners”), by their attorneys, hereby submit this opposition to the January 19, 2007 Motion to Dismiss (“Motion”) filed by ALLTEL Corporation, Dobson Communications Corporation and Verizon Wireless (hereinafter “Licensees”). The Motion requests dismissal of the Petition for Rule Making (“Petition”) filed by the Petitioners on November 30, 2006, asking that the sunset date for the cellular analog (or “AMPS”) transmission requirement of Rule Section 22.901(b) be extended an additional two years, *i.e.*, until February 18, 2010.¹ As shown below, the Motion is defective and should be rejected.

¹ The AMPS Sunset was adopted in Year 2000 Biennial Review – Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, WT Docket No. 01-108, *Report and Order*, 17 FCC Rcd. 18401 (2002) (the “AMPS Sunset Order”). *See also Public Notice, “Wireless Telecommunications Bureau Reminds Cellular Licensees Of Analog Reporting Requirement,”* Mimeo DA 05-3015, dated November 30, 2005 (the “November 30, 2005 Public Notice”) and *Public Notice, “Electronic Filing Of Analog Cellular Status Reports Will Be Available Through The Internet Beginning January 25, 2006 (Reports due by February 21, 2006),”* Mimeo DA 06-133, dated January 23, 2006.

The Licensees have requested that the Commission dismiss the Petition pursuant to Rule Section 1.401(e). This rule section provides that:

(e) Petitions which are moot, premature, repetitive, frivolous, or which plainly do not warrant consideration by the Commission may be denied or dismissed without prejudice to the petitioner.

Section 1.401(e) creates authority for the Commission to summarily dispose of certain petitions for rulemaking, rather than conducting a comment cycle. This rule section does not create a protest right for the public after a comment cycle for the petition has been established. To the contrary, Rule Section 1.403 states as follows:

All petitions for rule making (other than petitions to amend the FM, Television, and Air-Ground Tables of Assignments) *meeting the requirements of §1.401* will be given a file number and, promptly thereafter, a “Public Notice” will be issued (by means of a Commission release entitled “Petitions for Rule Making Filed”) as to the petition, file number, nature of the proposal, and date of filing.²

The Commission has already made a preliminary review of the Petition, and issued its *Public Notice*, “Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking to Extend Cellular Analog Sunset Date,” DA 06-2559, released December 20, 2006 (hereinafter “*Public Notice*”). The *Public Notice* specifically cites to Rule Section 1.403 in the first paragraph, and requests public comment on the Petition. Thus, the Commission has already made the determination that the Petition qualifies as “meeting the requirements of §1.401”, and the screening provision of Rule Section 1.401(e) is no longer applicable.

² 47 CFR § 1.403 (*emphasis added*).

This analysis of Rule Section 1.401(e) is consistent with the Commission's justification for adopting the rule. The Rule was adopted in 1980 as a way to "clear the decks" and dismiss a petition when the Commission's staff deems public comment (and expenditure of FCC staff resources in responding to such comment) to be unwarranted. See Amendments to Part 0, Sec. 0.281(b)(6), and Part 1, Secs. 1.401 and 1.405(d), of the Commission's Rules, with Respect to the Delegation of Authority to the Chief, Broadcast Bureau, and Procedures Regarding Petitions for Rule Making, *Memorandum Opinion and Order*, 47 RR 2d 1068, 79 FCC 2d 1, 1980 FCC LEXIS 287 (1980) ("*Part 1 MO&O*").

At Paragraph 4 of the *Part 1 MO&O*, the Commission stated as follows:

Under the amendment adopted herein, when a petition for rule making is moot, repetitive, premature, frivolous, or does not warrant consideration by the Commission, Public Notice need not be given, nor would comment be solicited. Rather, the Commission would dismiss or deny it, stating the reasons therefor and indicating that the petitioner has the right to seek reconsideration under Sections 1.429 and 1.106, or review under Sec. 1.104(b) of the Rules. *On the other hand, once Public Notice of the filing of a petition for rule making is given, we would withhold action on it until the record closed.* These rule changes obviate considerable delay in the processing of petitions which will be dismissed. They also relieve the public of needless effort in the preparation of comments on such petitions, as well as obviating Commission consideration of those comments. Additionally, *the rule changes ensure that when interested parties undertake to comment on a petition in a response to a Public Notice, we will not act until those comments have been received and reviewed.*³

In this instance, the Commission's staff has determined that the Petition qualified for a comment cycle, and the public has undertaken to comment on the Petition in response to the December 20, 2006 *Public Notice*. Assuming *arguendo* that Licensees had a right to lodge a protest under Rule Section 1.401(e), they chose to wait until the public had filed comments before they voiced their procedural objection. Pursuant to the

³ Id. (*Footnotes omitted, emphasis added*).

above-quoted language from the *Part 1 MO&O*, the Commission will withhold action until the comments filed in this proceeding have been reviewed, and the record closed.

The cases cited by Licensees do not alter this result. In the first cited case, Cyren Call Communications Corp. filed a petition for rulemaking on April 27, 2006, and the petition was noted among various other filings that had been submitted to the FCC on a Consumer and Public Affairs Bureau Reference Information Center *Public Notice*, Report No. 2794 (*rel.* October 30, 2006). The October 30, 2006 *Public Notice* invited interested persons to file statements opposing or supporting the petitions within 30 days (*i.e.*, by November 29, 2006). The FCC did not issue a separate (and more conspicuous) *Public Notice* outlining the issues raised by the petitioners and citing Rule Section 1.403, as it did with the instant Petition. Moreover, the Commission dismissed the Cyren Call petition on November 3, 2006 (a mere four days after issuing the public notice, and well before the comment cycle had terminated). It did so in large part because of the petitioner's admission that Congressional action was necessary for the requested relief. *See* Reallocation of 30 MHz of 700 MHz Spectrum (747-762/777-792 MHz) from Commercial Use, RM No. 11348, *Order*, DA 06-2278 (PSHSB *rel.* Nov.3, 2006), at para. 4. In the instant case, the Commission has concluded that several substantive issues are presented by the Petition, and thus issued its detailed *Public Notice* asking for public comment, posing no less than twelve questions to be addressed by commenters. The public has now submitted voluminous and varying comments on these issues.

In the second cited case, Northrop Grumman Information Technology filed a Petition for Rulemaking on April 21, 2003. Petitioners have been unable to locate any

indication that the Northrop petition was ever placed on *Public Notice* for general comment. Instead, the Northrop petition was summarily dismissed by a letter ruling citing Rule Section 1.401(e), signed by the Chief of the Wireless Bureau and the Chief of the Office of Engineering and Technology.⁴ The letter indicated that Northrop “has presented no persuasive evidence in its Petition to warrant its consideration,” and pointed out that Congressional action was needed to grant the relief requested. *Id.* at p. 2. These facts made dismissal without prejudice appropriate pursuant to Rule Section 1.401(e). Again, this situation does not exist in the case of the instant Petition.

The Motion should also be dismissed because it was not served on Petitioners. As discussed above, Rule Section 1.401(e) creates a screening procedure for the Commission’s staff, but does not create a protest right for the public. Rule Section 1.405(c) provides that, other than statements in response to a petition for rulemaking, “no additional pleadings may be filed unless specifically requested by the Commission or authorized by it.” It does not appear that the Commission either requested or authorized the Motion. Therefore, Licensees’ filing, which relies on arguments about the merits of the Petition,⁵ must be viewed as a “responsive statement” opposing to the Petition. Rule Section 1.405(a) provides that responses to petitions must be “accompanied by proof of service upon the petitioner on or prior to the date of filing.” Service must be made in accordance with Rule Section 1.47. In this case, the Motion does not include the required proof of service, and counsel for Petitioners received no service of the Motion (or the

⁴ Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, FCC, to Michael W. Grady, Vice President, Technology, Engineering and Quality and Sector Chief Technical Officer, Northrop Grumman Information Technology, DA 03-2940 (September 24, 2003). The dismissal letter does not refer to a Rule Making (RM) number or a public notice inviting comment on the petition.

⁵ See Motion at pp. 2-3.

related Joint Comments of the Licensees for that matter).⁶ Rule Sections 1.47 (c) and (d) make it clear that filing a document with the Commission, electronically or otherwise, does not constitute service on a party as required by the Commission's Rules. Therefore, the Motion should be dismissed as defective.

Finally, the substantive argument advanced by Licensees does not justify dismissal of the Petition under Rule Section 1.401(e). While Licensees claim that the AMPS rule applies only to mobile service under Rule Section 22.901(b),⁷ this rule section must be read in conjunction with Rule Section 22.901(a), which makes it clear that fixed and mobile services provided over a cellular system "are considered to be co-primary services." While Section 22.901(b) prescribes a technical format for analog service, it does not destroy the co-primary status of fixed cellular service. Moreover, the Commission clearly expressed concern for the possibility that the five-year analog transition may not be adequate. Therefore, it imposed a requirement that nationwide carriers file periodic reports as the five-year sunset date draws near.⁸ These reports must "address the continued need or demand for ancillary use of features and protocols that are part of the [analog] standard for various purposes such as CDPD, telemetry, telematics, vehicle tracking *and alarm systems*."⁹ The Commission further indicated that "other

⁶ Because Licensees were required to serve Petitioners with the Motion and failed to do so, it is respectfully submitted that Petitioners should be entitled to the three additional days for submitting an opposition specified in Rule Section 1.4(h). While Section 1.4(h) normally contemplates that service was in fact sent by mail (rather than a faster method), there is no slower method than no service at all. Therefore, this opposition is timely. This outcome is especially warranted because counsel for Petitioners did not see Licensees' Motion in the ECFS database for RM-11355 as late as January 24, 2007, but instead only discovered it on January 30, 2007. Counsel for Licensees advised the undersigned that an ECFS glitch prevented the posting of the Motion under RM-11355 for several days. Out of an abundance of caution, Petitioners are simultaneously filing a request for extension of time.

⁷ See *Id.* at pp. 2-3.

⁸ AMPS Sunset Order, Para. Nos. 31 – 34.

⁹ See November 30, 2005 *Public Notice* at p. 3 (*emphasis added*).

interested parties will be able to file reports or comments as appropriate. . .”¹⁰ The information contained in these reports “will be used to determine whether or not the Commission will initiate a proceeding to extend the sunset date or take enforcement action under Section 255.”¹¹ Thus, the rule making process embodied in the *Public Notice* asking for comment on the Petition is clearly within the scope of analog-related concerns identified by the Commission. While Licensees may disagree with the merits of Petitioners’ comments regarding such concerns, this disagreement is clearly a matter to be decided by the Commission upon a careful consideration of the record to be developed in RM-11355.

Conclusion

In light of the foregoing, it is respectfully requested that the Motion be dismissed as defective, and/or rejected as lacking merit.

Respectfully submitted,

**Alarm Industry Communications
Committee**

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¹⁰ AMPS Sunset Order, Para. Nos. 31-32.

¹¹ AMPS Sunset Order, Para. No. 32.

CERTIFICATE OF SERVICE

I, Cary Mitchell, hereby certify that a copy of the foregoing Opposition of AICC was served this 31st day of January, 2007, by hand delivery or by U.S. Mail, postage prepaid, to the following individuals at the addresses listed below:

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