

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

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| In the Matter of |) | |
| |) | |
| Zephyr Tele-Link |) | |
| |) | File No. 11022-CL-P-599-A-89 |
| Application for a Construction Permit to |) | |
| Establish a Cellular System Operating on |) | |
| Frequency Block A in the Domestic Public |) | |
| Cellular Radio Telecommunications Service |) | |
| To Serve the Oklahoma 4-Nowata Rural Service |) | |
| Area, Market No. 599A |) | |

ORDER

Adopted: February 22, 2000

Released: February 23, 2000

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. In this Order, we address the “Request for Approval of Settlement Agreement” filed by Zephyr Tele-Link (Zephyr) on September 15, 1999 (Zephyr Request I), the “Request for Approval of Settlement Agreement and Grant of Application” filed by Zephyr on December 13, 1999 (Zephyr Request II) and the “Conditional Request for Dismissal of Petition for Reinstatement and Grant of Application, for Dismissal of Related Pleadings and for Further Relief” (Conditional Request) filed by Progressive Cellular III B-3 (Progressive)¹ on September 15, 1999. For the reasons discussed below, we approve Zephyr Request I, Zephyr Request II, the Conditional Request and, subject to the condition set forth in this Order,² we grant Zephyr’s application to provide cellular service in the Oklahoma 4-Nowata Rural Service Area (RSA).³

2. Pursuant to an Agreement dated September 2, 1999 (Progressive Agreement)⁴ among Zephyr, Progressive and Alaska-3 Cellular Corporation (Alaska-3),⁵ and a separate Agreement dated December 7,

¹ Progressive Cellular III B-3 was the original winner of the lottery held for the Oklahoma 4-Nowata RSA, Market No. 599A. As set forth in footnote 7, *infra*, the Commission dismissed Progressive’s application as defective and that dismissal was upheld after judicial review.

² A special condition consistent with this Order will be placed on Zephyr’s granted authorization under File No. 11022-CL-P-599-A-89.

³ Zephyr is the re-lottery winner for the Oklahoma 4-Nowata RSA.

⁴ A copy of the Progressive Agreement is attached to Zephyr Request I as Exhibit 1.

⁵ Alaska-3 is the current non-wireline licensee for the Alaska 3-Haines RSA (Market No. 317A), having been assigned the authorization by RJL Cellular Partnership (RJL), the re-lottery winner in the Alaska 3-Haines RSA. See *Public Notice*, Report No. CL-95-5 (rel. October 21, 1994).

1999 (AALA Agreement) between Zephyr and Applicants Against Lottery Abuse (AALA),⁶ the parties have resolved certain long-standing issues regarding the status of the Oklahoma 4-Nowata RSA authorization.⁷

3. Pursuant to section 22.959,⁸ the Commission's 1996 decision in *Western California Cellular Partners*⁹ and our recent decision in *Progressive Cellular III B-2*,¹⁰ we will evaluate Zephyr Request II under former section 22.29,¹¹ which was in effect at the time of the filing of Progressive's application for an initial cellular system. Under former section 22.29, parties that, under a settlement agreement, apply to the Commission for the amendment or dismissal of either pleadings or applications shall at the time of the filing notify the Commission that such filing is the result of an agreement or understanding. Zephyr and AALA have complied with the notification requirement that was in effect at the time of Zephyr's initial application filing. We approve Zephyr Request II because it satisfies the requirements of former section 22.29, and we find that it is in the public interest pursuant to Section 309(d) of the Communications Act, as amended.¹²

⁶ On July 2, 1992, AALA filed a Petition to Deny Zephyr's application under File No. 11022-CL-P-599-A-89. AALA's Petition to Deny is being dismissed pursuant to the terms of the AALA Agreement.

⁷ The factual history regarding the Commission's licensing of the Oklahoma 4-Nowata RSA is set forth in the substantial Commission record in this matter. *See, e.g.*, In Re Application of Progressive Cellular III B-3, *Memorandum Opinion and Order*, 6 FCC Rcd 596 (1991) (wherein Progressive's application for the Oklahoma 4-Nowata RSA under File No. 10570-CL-P-599-A-89 was dismissed); In Re Application of Progressive Cellular III B-3, *Memorandum Opinion and Order*, 6 FCC Rcd 7178 (1991) (denial of Progressive's Petition for Reconsideration of the dismissal of its application); In Re Application of Progressive Cellular III B-3, *Memorandum Opinion and Order*, 7 FCC Rcd 2080 (1992) (denial of Progressive's Request for Stay of Non-Wireline Lottery for Market 599); *Progressive Cellular III B-3 v. Federal Communications Commission*, 986 F.2d 546 (D.C. Cir. 1993), Rehearing En Banc denied April 7, 1993, *cert. denied*, 114 S. Ct. 174 (1993) (U.S. Court of Appeals denial of Progressive's appeal of FCC order dismissing application); In the Matter of Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426 (released July 21, 1999)(granting Zephyr's Petition for Reconsideration and reinstating its application for the Oklahoma 4 – Nowata market to pending status).

⁸ 47 C.F.R. § 22.959. Section 22.959 of the Commission's rules specifically provides that pending applications for authority to operate the first cellular system on a channel block in an MSA or RSA market continue to be processed under the rules governing the processing of such applications that were in effect when those applications were filed, unless the Commission determines otherwise in a particular case.

⁹ In Re Applications of Western California Cellular Partners and MTEL Cellular, Inc., *Order*, 11 FCC Rcd 5705 (1996).

¹⁰ In the Matter of Progressive Cellular III B-2, *Order*, DA 00-115 (rel. January 24, 2000).

¹¹ 47 C.F.R. § 22.29 (1988). Since the filing of Zephyr's application, the Commission has rewritten Part 22 of the Commission's rules. *See*, Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd 6513 (1994).

¹² Consistent with our decisions in *Western California Cellular Partners* and *Progressive Cellular III B-2*, we decline to apply the rule against "greenmail" in this case, as there is nothing in the history of this proceeding to indicate that AALA's Petition to Deny Zephyr's application in the Oklahoma 4 – Nowata RSA was submitted for the purpose of extracting a settlement payment from Zephyr. *See* In Re Applications of Algreg Cellular Engineering, *Memorandum Opinion and Order*, FCC 99-281 (rel. October 18, 1999).

4. Zephyr Request I and Progressive's Conditional Request were filed on September 15, 1999, pursuant to the Commission's window extending the waiver on limitations on payments in settlement agreements among parties in contested proceedings,¹³ and therefore would not be subject to Commission rule section 22.129.¹⁴ We have reviewed Zephyr Request I and Progressive's Conditional Request and, pursuant to Section 309(d) of the Communications Act, as amended, we find that the proposed settlements are in the public interest.

5. We therefore grant Zephyr's application requesting authority to provide cellular service in the Oklahoma 4-Nowata RSA. Our grant of Zephyr's application is conditioned upon Zephyr filing a minor modification application within thirty days of the release of this Order to conform its service area boundary (SAB) and cellular geographic service area (CGSA) determination to comply with current Commission rule section 22.911.¹⁵ Failure to submit the required modification application in compliance with current rule 22.911, as set forth in the special condition on the authorization, shall result in a set aside of this Order and the automatic cancellation of the Zephyr's authorization under File No. 11022-CL-P-599-A-89.

6. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309, and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, Zephyr Tele-link's September 15, 1999 "Request for Approval of Settlement Agreement," Zephyr Tele-Link's December 13, 1999 "Request for Approval of Settlement Agreement and Grant of Application" and Progressive Cellular III B-3's September 15, 1999 "Conditional Request for Dismissal of Petition for Reinstatement and Grant of Application, for Dismissal of Related Pleadings and for Further Relief" are hereby APPROVED.¹⁶

7. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309, and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, Zephyr's application (File No. 11022-CL-P-599-A-89) is hereby GRANTED, subject to Zephyr's filing a minor modification application within thirty days of the release of this Order for the purpose of conforming its service area boundary (SAB) and cellular geographic service area (CGSA) determination in compliance with current Commission rule section 22.911. Failure to submit the required minor modification application within thirty days of the release of this Order which complies with current rule 22.911, as set forth in the special condition on the authorization, shall result in a set aside of this Order and the automatic cancellation of the authorization under File No. 11022-CL-P-599-A-89.

¹³ See, "Wireless Telecommunications Bureau Extends Waiver of Limitations on Payments in Settlement Agreements Among Parties in Contested Licensing Cases," *Public Notice*, DA 99-1734 (rel. August 30, 1999).

¹⁴ Section 22.129 was renumbered as current rule section 1.935 in the Commission's adoption of the Universal Licensing System rules. See *In the Matter of Biennial Regulatory Review – 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 Services*, *Report and Order*, 13 FCC Rcd 21027 (1998).

¹⁵ 47 C.F.R. § 22.911. Zephyr's application was originally submitted in 1989 and the applicable rules governing determination of cellular geographic service area have been revised.

¹⁶ Progressive's Petition for Reinstatement and Grant of Application and Petition to Dismiss or Deny Zephyr's application will be dismissed by separate order in accordance with the terms of the Conditional Request.

8. IT IS FURTHER ORDERED that, pursuant to sections 4(i) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), and section 1.2 of the Commission's rules, 47 C.F.R. §1.2, the March 17, 1998 "Request for Permission to Withdraw Motion for Declaratory Rulings and Related Pleadings" filed by Zephyr is hereby GRANTED.

9. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309, and section 1.939 of the Commission's rules, 47 C.F.R. § 1.939, the Petition to Deny filed by AALA on July 2, 1992 is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
Chief, Policy and Rules Branch
Commercial Wireless Division
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