

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Bachow/Coastel, L.L.C.,)	
)	
Complainant,)	
)	
v.)	File No. WB/ENF-F-98-005
)	
GTE Wireless of the South, Inc.,)	
)	
Defendant.)	

ORDER

Adopted: February 28, 2000

Released: February 29, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this order, the Enforcement Bureau grants the formal complaint filed by Bachow/Coastel, L.L.C. ("Bachow"), against GTE Wireless of the South, Inc. ("GTE"), pursuant to section 208 of the Communications Act of 1934, as amended (the "Act").¹ Bachow is a cellular radiotelephone carrier licensed to operate in the Gulf of Mexico Metropolitan Statistical Area ("GMSA"). GTE is a cellular radiotelephone carrier licensed in the adjacent Mobile, Alabama, Metropolitan Statistical Area ("MSA"). Bachow contends that the Service Area Boundaries ("SABs") for three of GTE's cell sites overlap Bachow's protected Cellular Geographic Service Area ("CGSA"). Bachow seeks an order directing GTE to modify the three cell sites to eliminate these overlaps. We find that GTE has violated sections 22.911(d) and 22.912 of the Commission's rules by having the SABs of the three cell sites overlap the Gulf of Mexico CGSA and we direct GTE to modify the three cell sites to eliminate the unlawful SAB extensions.

II. REGULATORY BACKGROUND

2. The regulatory background supporting this proceeding is complex and merits a brief discussion to understand the legal basis for this order. For over 15 years, land-based and water-

¹ See 47 U.S.C. § 208.

based cellular service providers have been in conflict over which carriers should serve the coastal areas along the Gulf of Mexico. In 1985, the Commission granted cellular licenses for both the A Block and the B Block to two water-based cellular carriers in the Gulf of Mexico and established the GMSA, similar to the MSAs already in existence for land-based carriers.

3. After a series of rulemakings and petitions from water-based cellular carriers in the 1980s, the Commission determined that the "coastline" would serve as the border between the GMSA and all of the land-based MSAs adjacent to the Gulf of Mexico. The Commission defines the term coastline as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters."²

4. In 1992, in two rulemaking orders,³ the Commission changed the CGSAs for all cellular licensees to resemble areas of reliable service more closely. The Commission implemented this change by redefining the SABs for cell sites with a 32 dBu contour-based formula, instead of a 39 dBu formula, and then limiting CGSAs to areas of reliable service as delineated by the new SABs. Before the formula change, CGSAs were coterminous with MSAs. In applying the new formula to the Gulf of Mexico, the CGSAs for the Gulf licensees were no longer coterminous with the GMSA. In addition, the Commission rejected petitions of the Gulf licensees that asked the Commission to implement a special formula for water-based cellular systems to account for the differences in propagation characteristics over water.

5. In December 1992, the Gulf licensees challenged the Commission's decision limiting the CGSAs to the area of reliable service, arguing that the Commission had ignored the unique operating circumstances facing Gulf of Mexico cellular licensees. On May 13, 1994, the United States Court of Appeals for the District of Columbia Circuit agreed with the licensees and ordered the Commission to vacate its rules regarding the limits of CGSAs in the Gulf, stating that water-based CGSAs warranted a more flexible definition than land-based CGSAs.⁴ Accordingly, the Commission's rules now include a notation that "the authorized CGSAs of the cellular systems licensed to serve the GMSA are those which were authorized prior to January 11, 1993."⁵ Consequently, Bachow's CGSA is currently defined as coterminous with the GMSA, with the coastline serving as the border between Bachow's CGSA and the adjacent MSA where GTE operates its cellular system.

² See *In re Applications of Petroleum Communications, Inc., and Gulf Cellular Associates*, 1 FCC Rcd. 511, ¶¶ 16-17 (rel. Nov. 7, 1986), relying on Supreme Court precedent in *United States v. Louisiana*, 363 U.S. 1, 66-67, n.108 (1960). That case involved both the Submerged Lands Act and the Convention on the Territorial Sea and the Contiguous Zone. See Submerged Lands Act, 43 U.S.C. §§ 1301-1364; see also Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 10(1), 15 U.S.T. 1606, 516 U.N.T.S. 205.

³ See *In the Matter of Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, Second Report and Order*, 7 FCC Rcd. 2449 (rel. Apr. 9, 1992) [hereinafter *Second Report and Order*]; see also *id.*, *Third Report and Order and Memorandum Opinion on Reconsideration*, 7 FCC Rcd. 7183 (rel. Nov. 4, 1992) [hereinafter *Third Report and Order*].

⁴ See *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164 (D.C. Cir. 1994).

⁵ 47 C.F.R. § 22.911(a).

III. PROCEDURAL HISTORY

6. This matter involves three B Block cell sites operated by GTE within the Mobile, Alabama, MSA and one B Block cell site operated by Bachow in the adjacent GMSA. On September 15, 1995, GTE notified the Commission that GTE had added the Dauphin Island, Alabama, cell site. On March 4, 1997, GTE notified the Commission that GTE had modified its existing Gulf Shores, Alabama, cell site by changing the antenna and the effective radiated power. On June 6, 1997, GTE notified the Commission that GTE had added the Gulf Shores Beach, Alabama, cell site. As for the GMSA cell site, Bachow notified the Commission that Bachow had added a cell site in the Viosca Knoll Block 124 ("VK-124") on November 4, 1997.

7. In its complaint, Bachow alleges that the SABs for the three GTE cell sites overlap the Gulf CGSA where Bachow operates the VK-124 cell site. On November 10, 1997, Bachow requested that GTE withdraw the SAB extensions in accordance with section 22.911(d)(2)(i) of our rules.⁶ Over the next few months, Bachow and GTE engaged in discussions concerning possible means of resolving this matter. On July 28, 1998, after discussions ended without a resolution, Bachow again asked GTE to withdraw the SAB extensions of the three cell sites. On August 6, 1998, GTE denied Bachow's request. On August 20, 1998, Bachow filed this formal complaint alleging that GTE has violated section 22.911(d) and 22.912(a) of the Commission's rules.⁷

IV. DISCUSSION

8. We find that the SABs of the cell sites located at Dauphin Island, Gulf Shores, and Gulf Shores Beach unlawfully overlap the Gulf of Mexico CGSA. Sections 22.911(d) and 22.912 of the Commission's rules protect cellular systems from interference and capture of subscriber traffic by adjacent systems on the same channel block. The rules specify these protections:

[C]ellular systems are entitled to protection from co-channel and first-adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel. ... Subscriber traffic is captured if an SAB of one cellular system overlaps the CGSA of another operating cellular system. ... However, cellular licensees may continue to operate existing facilities that produce an SAB overlapping a subsequently authorized portion of the CGSA of another system on the same channel block until the licensee of that system requests that the SAB be removed from its CGSA. ... In the event such request is made, the licensee of the overlapping system must reduce transmitting power or antenna height (or both) at the pertinent cell site as necessary to remove the SAB from the CGSA of the other system, unless written consent from the licensee of the other system allowing the SAB to remain is obtained.⁸

⁶ See 47 C.F.R. § 22.911(d).

⁷ In November 1999, this proceeding was transferred from the Wireless Telecommunications Bureau to the Commission's newly established Enforcement Bureau.

⁸ See 47 C.F.R. § 22.911(d).

GTE added or modified cell sites so that its system overlapped Bachow's CGSA. Bachow twice asked GTE to roll back the SAB extensions of its co-channel cell sites and both times GTE refused to do so. We recognize that GTE and Bachow did engage in discussions, albeit unsuccessfully, to effect a settlement of their overlap issues after Bachow made its first request. The rules indicate that private arrangements between parties would permit the SAB from one cellular operator to overlap the CGSA of an adjacent co-channel cellular operator.⁹ Because GTE and Bachow did not reach such an agreement, we find that GTE is in violation of the rules.

9. In an effort to protect cellular system operators from losing customers, the regulations established a bright-line rule that subscriber traffic is considered captured when the SAB of the first system overlaps the CGSA of the second system. GTE argues in its December 6, 1999, Motion to Dismiss that eliminating the overlap of its cell sites and the VK-124 cell site SAB satisfies this requirement. We disagree with GTE because the rule requires removal of GTE's SABs from Bachow's CGSA, not merely the VK-124 SAB. As we discussed above, Bachow's CGSA is coterminous with the GMSA, which starts at the coastline. In order to comply with this rule, GTE would have to roll back the three SABs so they do not cross the coastline.

10. GTE further contends that the Commission authorized these overlaps into the Gulf of Mexico CGSA when adopting the 1992 rules changing the contour-based formula from 39 dBu to 32 dBu.¹⁰ In the *Second Report and Order*, the Commission stated that "new service area boundary extensions created *solely* by [the contour] change are considered de minimis and are hereby authorized."¹¹ GTE does not proffer evidence that indicates the formula change was the only reason these SABs currently overlap the Gulf of Mexico CGSA. In fact, GTE modified or put into service all three cell sites over three years after the Commission discussed this de minimis exemption. GTE merely states that because two of the SABs fall within the 32 dBu contours of other cell sites that were authorized by the 1992 rules, the Commission should consider them as satisfying the de minimis exemption as well, even though they were not in service in 1992. For the Dauphin Island SAB, GTE relies on the 32 dBu contour of the decommissioned Alabama Port cell site. For the Gulf Shores Beach SAB, GTE relies on the Gulf Shores cell site that GTE modified in 1997. As a result, we are not convinced that this evidence supports the conclusion that the SABs extend into the Gulf CGSA solely because of the formula change.

11. GTE also claims that the SAB extensions into Bachow's CGSA are allowed as de minimis extensions under section 22.912(a) of the Commission's rules.¹² As the rule indicates, however, de minimis extensions cannot "extend into the CGSA of any other licensee's cellular system on the same channel block (unless the licensee of such other system consents to the extension)"¹³ Bachow has clearly not consented to GTE's SAB extensions. GTE also argues that the public interest would not be served by requiring GTE to roll back the SAB extension even if Bachow has not consented. This argument must also fail. As the Commission has stated before in applying the same regulatory provision, "no discretion is accorded under the Rule to the licensee of

⁹ See *id.*; see also 47 C.F.R. § 22.912(a).

¹⁰ See *Second Report and Order*.

¹¹ *Id.* at ¶ 13, n.35 (emphasis added).

¹² See 47 C.F.R. § 22.912(a).

¹³ *Id.*

the overlapping system to refuse to remove its SAB when this, in its opinion, would be unreasonable or not in the public interest.”¹⁴ If GTE believes that GTE is better equipped to serve the GMSA, then GTE must obtain Bachow’s consent to offer service there, in accordance with the Commission’s rules.¹⁵

12. Months after GTE filed its original answer, GTE made a supplemental filing that contends the SAB of Dauphin Island does not overlap the Bachow CGSA. GTE states that the presence of Sand Island extends the “coastline” further into the Gulf of Mexico and, therefore, extends the Mobile MSA–GMSA border further into the Gulf. As a result, GTE argues that the entire Dauphin Island SAB falls within the Mobile MSA. We, however, do not agree with GTE’s assessment of the coastline as it defines the Mobile MSA–GMSA border. According to the United States Geological Survey, all three islands that could be construed as Sand Island are below water at high tide. Maps issued by the Geological Survey indicate these islands with dotted lines.¹⁶ As we have stated above, the Commission has followed the United States Supreme Court by using definitions from the Convention on Territorial Sea and the Contiguous Zone. Under that Convention, the term island is defined as “a naturally formed area of land, surrounded by water, which is above water at high tide.”¹⁷ Because Sand Island does not meet this definition of island, we do not believe that the waters between Sand Island and Dauphin Island constitute shoreline or coastal waters that would place them inside the Mobile MSA. We find that Sand Island is located within the GMSA.

V. WAIVER PETITION OF GTE

13. On October 19, 1998, GTE submitted a petition in this proceeding asking the Commission to waive sections 22.911(d) and 22.912(a)¹⁸ of the Commission’s rules (the “Petition”). Because we believe that consideration of a waiver petition is not appropriate in the context of a formal complaint proceeding, we will dismiss the Petition without prejudice to GTE’s ability to refile in the appropriate context to seek prospective relief.¹⁹

VI. CONCLUSION

14. For the reasons discussed above, we conclude that GTE has been violating sections 22.911(d) and 22.912 of the Commission’s rules, 47 C.F.R. §§ 22.911(d), 22.912, since August 6, 1998. We deny Bachow’s request that we assess forfeitures against GTE in this proceeding. Section 208 of the Act provides for private remedies for individuals aggrieved by carriers, while section 503 gives the Commission the discretion to assess forfeitures. If the we determine that

¹⁴ See *Sagir, Inc. v. N.E. Colorado Cellular, Inc.*, 12 FCC Rcd. 1185, ¶ 18 (rel. Feb. 3, 1997).

¹⁵ See 47 C.F.R. §§ 22.911(d), 22.912(a).

¹⁶ See Bachow’s *Reply to Answer*, Exhibit M (filed Sep. 14, 1998).

¹⁷ Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 10(1), 15 U.S.T. 1606, 516 U.N.T.S. 205.

¹⁸ 47 C.F.R. §§ 22.911(d), 22.912(a).

¹⁹ See 47 C.F.R. §§ 1.3, 22.119(a).

GTE's violations of the Commission's rules warrant the issuance of a Notice of Apparent Liability for Forfeiture under section 503, we will do so in a separate proceeding.²⁰

15. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that the above-referenced complaint filed by Bachow IS GRANTED.

16. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that within thirty (30) days from the Release Date of this Order GTE must 1) eliminate any SAB extensions into the GMSA from its Dauphin Island, Gulf Shores, and Gulf Shores Beach cell sites; 2) certify in writing to the Commission that the SABs of the three cell sites have been adjusted in accordance with this Order; and 3) notify the Commission of any resulting modifications to its license pursuant to 47 C.F.R. § 1.947. In the alternative, GTE and Bachow may file a joint statement with the Commission within thirty (30) days from the Release Date of this Order indicating that Bachow consents to SAB extensions of one or more of the three GTE cell sites into the GMSA in accordance with 47 C.F.R. §§ 22.911(d) and 22.912(a). If the parties do not reach an agreement for a particular cell site, then GTE must comply with the three provisions above for each cell site not included in the joint statement.

17. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 208, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Defendant's Waiver Petition IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION



David H. Solomon
Chief, Enforcement Bureau

²⁰ See *Halprin v. MCI Telecommunications Corp.*, 13 FCC Rcd. 22568, ¶ 31 (rel. Nov. 10, 1998); see also 47 U.S.C. §§ 208, 503(b); see also 47 C.F.R. § 1.80(e).