

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

In the Matter of	)	
	)	
PEGASUS CELLULAR TELEPHONE	)	FCC File Nos. 9605280 and 9605281
COMPANY NO. 3 (NY-4), INC.	)	
	)	
Petition for Reconsideration of Secondary	)	
Status and Reinstatement of Primary Status	)	
for Station WPJD312, Webster, New York, and	)	
WLM409, Penfield, New York	)	

**ORDER ON RECONSIDERATION**

**Adopted: March 24, 2000**

**Released: March 29, 2000**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On July 29, 1999, Pegasus Cellular Telephone Company No. 3 (NY-4), Inc. (Pegasus Cellular) requested reconsideration of the grant of secondary status for Station WLM409 in Penfield, New York, and Station WPJD312 in Webster, New York.<sup>1</sup> For the reasons discussed herein, we deny Pegasus Cellular's petition.

**II. BACKGROUND**

2. *Reallocation of the 2 GHz Band.* On January 16, 1992, the Commission proposed to reallocate portions of the 2 GHz band from fixed microwave services (FMS) to emerging technology (ET) services, including the personal communications services (PCS).<sup>2</sup> The Commission intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent licensees, least disruptive to the public and most conducive to the introduction of new services.<sup>3</sup> Accordingly, first, to preserve the availability of the existing vacant 2 GHz spectrum, the Commission proposed to license all new facilities in the 2 GHz band on a secondary basis.<sup>4</sup> Second, rather than immediately clearing the 2 GHz band of the

<sup>1</sup> Letter from Kellye Abernathy, Director, Regulatory Services, Southwestern Bell Mobile Systems, Inc., SBC Wireless, Inc., Parent Company of Pegasus Cellular Telephone Company No. 3 (NY-4), Inc., to Albert Knerr, Chief of Technical Analysis Section, Common Carrier Domestic Radio, Federal Communications Commission (filed July 29, 1999) (Petition).

<sup>2</sup> Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Dkt. No. 92-9, *Notice of Proposed Rule Making*, 7 FCC Rcd 1542 (1992) (ET NPRM).

<sup>3</sup> *Id.* at 1545 ¶ 22.

<sup>4</sup> *Id.* Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and are not protected from interference from primary operations. See 47 C.F.R. § 101.3.

incumbent FMS users, the Commission proposed to permit the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant length of time, by the end of which the incumbents were to relocate to another portion of the spectrum.<sup>5</sup> The Commission also proposed to provide the ET licensees with the option of requiring the FMS incumbents to relocate sooner and paying the additional costs caused by the earlier relocation.<sup>6</sup> One practical effect of the Commission's proposal was that incumbent FMS licensees that were authorized on a primary basis would have the costs of relocating to other bands paid for by the new ET licensees if the ET licensees forced them to relocate. On the other hand, FMS licensees that were authorized on a secondary basis would be treated differently.

3. On May 14, 1992, the Microwave Branch, Licensing Division of the former Private Radio Bureau (Microwave Branch) issued a *Public Notice* stating that while new facilities in the 2 GHz band would be given secondary status, secondary status would not be accorded to those stations licensed prior to January 16, 1992, as to which the FMS licensee made certain minor or technical modifications of its facilities.<sup>7</sup> The *Public Notice* further indicated that secondary status would not be accorded in situations where additional links were required to complete a communications network or where new facilities and/or frequencies were operationally connected to a network system licensed prior to January 16, 1992, where the applicant made a valid showing of its need for the new facilities.<sup>8</sup> Later that year, the Commission affirmed this approach.<sup>9</sup> As a result, licensees of existing 2 GHz facilities could make certain modifications and minor extensions and retain primary status, but major extensions or expansions would result in a station being accorded secondary status unless a special showing of need was made to justify primary status.<sup>10</sup>

4. On October 12, 1995, the Commission sought comment on whether it should continue to grant any 2 GHz FMS applications on a primary basis.<sup>11</sup> The Commission stated that to the extent practicable it would continue to apply the current rules governing primary and secondary status to pending modification applications, but that subsequently filed applications would be granted primary status only for modifications that would not add to the relocation costs of PCS licensees.<sup>12</sup> Thus, the Commission set forth a limited list of technical changes that would be granted primary status, and stated that any other modifications would be

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<sup>5</sup> *ET NPRM*, 7 FCC Rcd at 1545 ¶ 24.

<sup>6</sup> *Id.*

<sup>7</sup> Two Gigahertz Fixed Microwave Licensing Policy, *Public Notice*, Mimeo No. 23115 (May 14, 1992).

<sup>8</sup> *Id.*

<sup>9</sup> Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Dkt. No. 92-9, 7 FCC Rcd 6886, 6891-92 ¶ 31 (1992).

<sup>10</sup> *Id.*

<sup>11</sup> Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *Notice of Proposed Rule Making*, 11 FCC Rcd 1923, 1925 ¶ 2 (1995) (*Cost Sharing NPRM*).

<sup>12</sup> *Id.* at 1964 ¶ 89.

permitted only on a secondary basis unless the incumbent made a special showing of need to justify primary status and established that the modifications would not add to the relocation costs of PCS licensees.<sup>13</sup>

5. On April 25, 1996, the Commission adopted the current regulations regarding the licensing of FMS systems in the 2 GHz band,<sup>14</sup> which went into effect August 1, 1996.<sup>15</sup> As a result, major modifications and extensions are licensed on a secondary basis, and primary status is granted only for a limited number of technical changes.<sup>16</sup> All other minor modifications render the modified license secondary unless the FMS licensee justifies primary status and the modification does not add to the relocation costs to be paid by the new ET licensees.<sup>17</sup>

6. *Pegasus Cellular's License Applications.* On April 15, 1996, Pegasus Cellular filed applications to modify the licenses for FMS Stations WLM409 and WPJD312 in order that they be newly linked via the 2 GHz band.<sup>18</sup> On June 14, 1996, we granted these applications and re-issued the licenses for Stations WLM409 and WPJD312 with a secondary status condition. On March 29, 1999, Pegasus Cellular filed an application to modify the license for Station WLM409 to delete the 2 GHz path which connected Station WLM409 with Pegasus Cellular's Station WLM408.<sup>19</sup> We granted this application on May 17, 1999, and re-issued the license with a secondary status condition. On July 29, 1999, Pegasus Cellular requested that the licenses for Stations WLM409 and WPJD312 be reinstated to primary status.<sup>20</sup>

### III. DISCUSSION

7. We note, as an initial matter, that Pegasus Cellular filed its petition for reconsideration on July 29, 1999, more than three years after the secondary status condition was first imposed on the licenses for Stations WLM409 and WPJD312. Ordinarily, petitions for reconsideration of the conditional grant of a license must be filed within 30 days from the date of such grant.<sup>21</sup> But as we determined in *Contel Cellular of Nashville, Inc. (Contel)*, the language placed on the 2 GHz licenses did not provide sufficient

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<sup>13</sup> *Id.* at 1926 ¶ 4. The Commission noted that this new list of minor technical modifications was more limited than the modifications listed in the 1992 *Public Notice*.

<sup>14</sup> Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-89 (*Cost Sharing First Report and Order*); 47 C.F.R. § 101.81.

<sup>15</sup> 61 Fed. Reg. 29679, 29680, 29695 (1996).

<sup>16</sup> *Cost Sharing First Report and Order*, 11 FCC Rcd at 8868 ¶ 86; 47 C.F.R. § 101.81.

<sup>17</sup> *Cost Sharing First Report and Order*, 11 FCC Rcd at 8868 ¶ 86; 47 C.F.R. § 101.81.

<sup>18</sup> See *Public Notice*, Report No. 1185, Wireless Telecommunications Bureau Receipts and Disposals (rel. May 1, 1996).

<sup>19</sup> See *Public Notice*, Report No. 2036, Wireless Telecommunications Bureau Receipts and Disposals (rel. Apr. 13, 1999).

<sup>20</sup> Petition at Exhibit 1.

<sup>21</sup> 47 C.F.R. § 94.41 (1995) (currently 47 C.F.R. § 1.945(e)); see 47 U.S.C. § 405.

notice to the affected 2 GHz license holders that their licenses were subject to a secondary status condition.<sup>22</sup> Accordingly, for the reasons explained in *Contel*, Pegasus Cellular's petition is considered timely and will be addressed on its merits.<sup>23</sup>

8. Pegasus Cellular argues that Stations WLM409 and WPJD312 should have retained primary status after the 1996 modification because the new link was operationally connected to a network system licensed prior to January 16, 1992.<sup>24</sup> In support of its argument, it cites the Microwave Branch's 1992 *Public Notice*.<sup>25</sup> We note, however, that at the time Pegasus Cellular filed its applications, the licensing policy announced in the 1992 *Public Notice* had been superseded by the policy set forth in the Commission's 1995 *NPRM*.<sup>26</sup> Under the Commission's 2 GHz rules that were then in effect, primary status would be granted for a limited number of technical changes, and secondary status would be granted for all other modifications unless the incumbent made a special showing of need to justify primary status and established that the modifications would not add to the relocation costs of PCS licensees.<sup>27</sup> We find that linking Stations WLM409 and WPJD312 via the 2 GHz band was not among the limited number of technical changes that could be granted with primary status. Therefore, primary status would have been appropriate only upon a special showing of need to justify primary status and a demonstration that the modification would not add to the relocation costs of PCS licensees. We find that the initial application did not include the requisite showing. Further, the petition for reconsideration offers no basis to support either required showing.<sup>28</sup> Accordingly, we conclude that the grant of Pegasus Cellular's licenses for Stations WLM409 and WPJD312 with a secondary status condition was appropriate and consistent with the Commission's rules and policies then in effect concerning 2 GHz licensing.<sup>29</sup>

#### IV. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 101.69 of

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<sup>22</sup> See *Contel Cellular of Nashville, Inc., Order on Reconsideration*, 14 FCC Rcd 6302, 6305-06 ¶ 10 (WTB PSPWD 1999).

<sup>23</sup> *Id.*

<sup>24</sup> Petition at Exhibit 1.

<sup>25</sup> *Id.*

<sup>26</sup> See *supra* ¶ 4. Cf. *Cal-One Cellular L.P., Order on Reconsideration*, 14 FCC Rcd 13528, 13530 ¶ 6 (WTB PSPWD 1999) (declining to apply policy announced in the 1992 *Public Notice* to an application filed after that policy had been superseded).

<sup>27</sup> *Cost Sharing NPRM*, 11 FCC Rcd at 1926 ¶ 4.

<sup>28</sup> See, e.g., *Highland Cellular, Inc., Order on Reconsideration*, 14 FCC Rcd 19573, 19576 ¶ 9 (WTB PSPWD 1999) (Highland Cellular made a special showing of need when it argued that the emergency nature of the 911 service that it provides requires immediate and clear access to the cellular telephone system and that it therefore needs primary status for the 2 GHz stations that relay the emergency 911 messages).

<sup>29</sup> Because we conclude that the imposition of secondary status in 1996 was proper, we need not address Pegasus Cellular's argument that the 1999 modification to Station WLM409 should not have resulted in secondary status and, thus, consider such argument to be moot.

the Commission's Rules, 47 C.F.R. §§ 1.106, 101.69, the Petition for Reconsideration of Pegasus Cellular Telephone Company No. 3 (NY-4), Inc., filed on July 29, 1999, IS DENIED.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau