

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

In the Matter of)
Application of Cel-Tel Communications)
For Construction Permit to) File No. 11019-CL-P-509-A-89
Establish a Cellular System)
Operating on Frequency Block A)
in the Domestic Public Cellular)
Radio Telecommunications Service)
to Serve the Missouri 6, Marion)
Rural Service Area, Market 509A)

Memorandum Opinion and Order

Adopted: August 30, 2001

Released: August 31, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

I. Introduction

1. In this order, we address two Petitions to Deny the above-captioned application filed by Jefferson Cellular, L.P. (Jefferson) on July 29, 1992 and March 5, 2000. We also address Jefferson's Petition for Reinstatement, filed on March 2, 2001, of its application for the Missouri 6, Marion RSA (Missouri 6). We further address Cel-Tel Communications's (Cel-Tel) Request for Approval of Settlement Agreement and Grant of Application filed on June 5, 2000. For the reasons discussed below, Jefferson's petitions to deny are dismissed, and its Petition for Reinstatement is denied. We approve Cel-Tel's Request for Approval of Settlement and Grant of Application to provide service in the Missouri 6-Marion RSA, and we grant the above-referenced application.

II. Background

2. On December 13, 1989, Cel-Tel was chosen as the tentative selectee in the Ohio 5-Hancock RSA (Ohio 5) lottery. Applicants Against Lottery Abuses (AALA) filed petitions to deny against Cel-Tel's Ohio 5 application and the applications of other lottery participants who entered into risk-sharing

1 Jefferson Petition to Deny or, in the Alternative, Designate for Hearing, File No.11019-CL-P-509-A-89 (filed July 29, 1992) (Petition I).

2 Jefferson Petition to Deny, File No.11019-CL-P-509-A-89 (filed March 5, 2001) (Petition II).

3 Jefferson Petition for Reinstatement, File No. 10449-CL-P-509-A-89 (filed March 2, 2001).

4 Cel-Tel Request for Approval of Settlement Agreement and Grant of Application, File No. 11019-CL-P-509-A-89 (filed June 5, 2000 and re-filed Feb. 2, 2001).

5 In re Application of Algreg Cellular Engineering, Memorandum Opinion and Order, 7 FCC Rcd. 8686 ¶ 246 (1992).

6 File No. 10912-CL-P-589-A-89.

agreements with The Cellular Corporation (TCC).⁷ AALA's petitions to deny were consolidated into one proceeding, which became known as the *Algreg Proceeding*.⁸

3. On June 28, 1989, the Commission held the initial lottery for Missouri 6 and selected Jefferson's application⁹ as the winner.¹⁰ Subsequently, the Mobile Services Division dismissed Jefferson's Missouri 6 application because it violated the foreign ownership restrictions applicable at that time.¹¹ On April 8, 1992, the Commission relotted Missouri 6 and Cel-Tel's captioned application was selected as the winner.¹² AALA filed a petition to deny against Cel-Tel's Missouri 6 application on July 2, 1992.¹³ AALA argued that, since Cel-Tel's qualifications as a licensee were called into question in the then-pending *Algreg Proceeding*, no further action should be taken on its Missouri 6 application until a determination of fitness was made.¹⁴ On July 29, 1992, Jefferson filed a Petition to Deny or, in the Alternative, Designate for Hearing against Cel-Tel's Missouri 6 application.¹⁵ In that Petition, Jefferson argued that Cel-Tel's application was defective because Cel-Tel was involved in the risk-sharing agreement under investigation in the *Algreg Proceeding*.¹⁶ On June 3, 1997, after a series of hearings, the Commission determined that the risk-sharing agreement at issue in *Algreg* did not render Cel-Tel's Ohio-5 application defective.¹⁷ On June 5, 2000, Cel-Tel filed a Request for Approval of Settlement Agreement that it had reached with AALA concerning its Missouri 6 application.¹⁸ On March 5, 2001, Jefferson filed a second petition to deny against Cel-Tel's Missouri 6 application, contending that Cel-Tel violated section 1.65 of the Commission rules¹⁹ by failing to amend its Ohio 5 application during the *Algreg Proceeding* to reflect its selection for Missouri 6. Jefferson also filed a Petition for Reinstatement of its initial Missouri 6 application.

⁷ In re *Algreg Cellular Engineering*, *Memorandum Report and Order*, 12 FCC Rcd. 8148 (1997).

⁸ The *Algreg Proceeding* involved a series of hearings to determine whether a risk-sharing agreement entered into by Cel-Tel, TCC and others rendered those applications defective.

⁹ File No. 10449-CL-P-509-A-89.

¹⁰ See Public Notice, Mimeo 3441, Report No. CL-89-200 (June 29, 1989); Public Notice, Report No. CL-89-260 (Sept. 1, 1989).

¹¹ See *Application of Continental Cellular*, *Memorandum Opinion and Order*, 6 FCC Rcd. 6834 (1991), affirmed, *Moving Phones Partnership, L.P. v. FCC*, 998 F.2d 1051 (1993) (*Moving Phones*), cert. denied sub nom, *Cellswitch*, 511 U.S. 1004 (1994). Jefferson's Missouri 6 application was consolidated with the applications of Continental Cellular and others that were charged with violating the foreign ownership restrictions of former section 310(b)(3).

¹² See Public Notice, Report No. CL-92-101 (June 12, 1992) (1992 Public Notice).

¹³ AALA Petition to Deny, File No. 11019-CL-P-509-A-89 (filed July 2, 1992).

¹⁴ *Id.* at 2.

¹⁵ Petition I.

¹⁶ *Id.* at 2-5.

¹⁷ *Algreg*, 12 FCC Rcd. 8148.

¹⁸ Request for Approval of Settlement Agreement and Grant of Application filed by Cel-Tel on June 5, 2000 (resubmitted and re-served on February 2, 2001). The Settlement Agreement concerned only Cel-Tel's application for Missouri 6, which was not at issue in the *Algreg Proceeding*.

¹⁹ 47 C.F.R. § 1.65.

III. Discussion

4. In Petition I, Jefferson argues that Cel-Tel's Missouri 6 application should be denied or, in the alternative, designated for hearing to determine whether the risk-sharing agreement at issue in *Algreg* rendered Cel-Tel's Missouri 6 application defective. Since that time, the Commission has determined that the risk-sharing agreement involved in *Algreg* did not render the applications in question defective.²⁰ As a result, a challenge to Cel-Tel's Missouri 6 application premised on *Algreg* is without any basis and is moot. Accordingly, we dismiss Jefferson's Petition I.

5. We likewise dismiss Jefferson's Petition II pursuant to section 309 of the Communications Act of 1934, as amended (Act), because Jefferson is not a "party in interest,"²¹ and therefore lacks standing.²² In general, to establish standing, a petitioner must allege sufficient facts to demonstrate that grant of the subject application would cause the petitioner to suffer a direct injury.²³ The petition must further demonstrate a causal link between the claimed injury and the challenged action.²⁴ In the instant case, Jefferson contends that grant of Cel-Tel's Missouri 6 application would result in the loss of its rights to Missouri 6. We disagree. Jefferson does not have a stake in the challenged licensing process because Jefferson's application for Missouri 6 was dismissed in 1991 by a final Commission order.²⁵ Jefferson has now fully exhausted the appeals process and was unsuccessful.²⁶ Even if we were to dismiss or deny Cel-Tel's application, the Missouri 6 RSA authorization could not be granted to Jefferson because it has no pending or viable application in that market. Therefore, Jefferson's Petition II is dismissed for lack of standing.

6. Moreover, Jefferson's Petition II is untimely and must be dismissed on that basis. The June 12, 1992 public notice notifying the public of Cel-Tel's selection for the Missouri 6 RSA stated that all petitions to deny were due by July 29, 1992,²⁷ over eight years before the March 5, 2001 Petition to Deny was filed. Jefferson's submission of a timely petition to deny²⁸ does not entitle it to submit a second petition nearly nine years later. Accordingly, we dismiss this Petition to Deny on the second basis that it is untimely.

7. We deny Jefferson's Petition for Reinstatement. Jefferson's request for reinstatement amounts to a petition for reconsideration of the Commission's 1991 order dismissing Jefferson's Missouri 6 application for failure to comply with the alien ownership rules of section 310 of the Act.²⁹ Jefferson argues that subsequent amendments to section 310(b)(3) made by the Telecommunications Act of 1996, which revised the alien ownership restrictions, provide a basis for reinstatement of its Missouri 6

²⁰ See *Algreg*, 12 FCC Rcd. 8148.

²¹ 47 U.S.C. § 309(d)(1). See also 47 C.F.R. § 1.939.

²² Section 309(d)(1) of the Communications Act of 1934 (Act), as amended, permits any "party in interest" to file a petition to deny an application.

²³ See *Los Angeles Cellular Telephone Co.*, 13 FCC Rcd. 4601, 4603-4604 (1998), citing *AmericaTelCorp.*, 9 FCC Rcd 3993, 3995 (1994), citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

²⁴ See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74, 81 (1978).

²⁵ Application of Continental Cellular, *Memorandum Opinion and Order*, 6 FCC Rcd 6834 (1991).

²⁶ See *Moving Phones*, 998 F.2d 1051.

²⁷ See 1992 Public Notice.

²⁸ See Petition I.

²⁹ See Jefferson Petition for Reinstatement.

application *nunc pro tunc*.³⁰ We do not disagree that Jefferson's original application might be grantable under the revised statutory provisions. We are not, however, required to reinstate an application because it complies with a rule established *after* its dismissal. To do so would "open the flood gates" to other dismissed applicants. Jefferson's application was properly dismissed in 1991 by a final Commission Order³¹ and Jefferson has exhausted its appeals process and was unsuccessful. By the time section 310(b) of the Act was revised in 1996, Jefferson's application had been long dismissed. Therefore, we find no justification warranting reinstatement of Jefferson's application.

8. In its Petition for Reinstatement, Jefferson argues that our action in *Algreg* to grant pending applications that violated the foreign ownership restrictions at the time of filing, but that complied with the provisions of section 310(b) as amended in 1996, requires a similar result for Jefferson's Missouri 6 application.³² Unlike the applications at issue in *Algreg*, Jefferson's application was no longer pending at the time section 310(b) was amended.³³ The Commission's action in *Algreg* is completely distinguishable from Jefferson's situation, and does not compel us to reinstate or approve Jefferson's application. Likewise, again contrary to Jefferson's claims, the Commission's action in *McElroy Electronics Corp.*³⁴ does not warrant reinstatement of Jefferson's application. In that case, the Commission reinstated McElroy's applications *nunc pro tunc* pursuant to an order by the U.S. Court of Appeals for the District of Columbia Circuit.³⁵ Here, that same court affirmed the Commission's dismissal of Jefferson's application.³⁶ Further, unlike Jefferson, McElroy had not exhausted the appeals process at the time it sought reinstatement. Therefore, we also find that our decision in *McElroy* does not compel us to reinstate or approve Jefferson's application.

9. We approve Cel-Tel's Request for Approval of Settlement Agreement and Grant of Application. Pursuant to an Agreement dated June 5, 2000 (Agreement)³⁷ between Cel-Tel and AALA, the parties have resolved certain long-standing issues relating to Cel-Tel's application for the Missouri 6 RSA. Since the filing of Cel-Tel's application, the Commission has rewritten Part 22 of the Commission's rules.³⁸ Section 22.959³⁹ 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. Pursuant to section 22.959 and the Commission's decisions in *Zephyr Tele-Link*⁴⁰ and *Western California Cellular Partners*,⁴¹ we will apply former section

³⁰ *Id.* at 5.

³¹ See *Continental Cellular*, 6 FCC Rcd. 6834.

³² Jefferson Petition for Reinstatement at 6-9.

³³ See *Algreg*, 12 FCC Rcd. 8148.

³⁴ See *In Re Applications of McElroy Electronics Corp.*, *Memorandum Opinion and Order*, 10 FCC Rcd. 6762 (1995).

³⁵ *Id.*

³⁶ See *Moving Phones*, 998 F.2d 1051.

³⁷ A copy of the Agreement is attached to Cel-Tel's Request for Approval of Settlement Agreement and Grant of Application as Attachment A.

³⁸ Revision of Part 22 of the Commission's Rules Regarding the Public Mobile Service, *Repot and Order*, 9 FCC Rcd. 6513 (1994).

³⁹ 47 C.F.R. § 22.959 (1998).

⁴⁰ *In the Matter of Zephyr Tele-Link*, *Order*, 15 FCC Rcd. 4247 (2000).

⁴¹ *In re Applications of Western Wireless Cellular Partners and MTEL Cellular, Inc.*, *Order*, 11 FCC Rcd. 5705 (1996).

22.29,⁴² which was in effect at the time of the filing of Cel-Tel's application for an initial cellular system, in our review of the proposed settlement agreement. Under former section 22.29, parties that apply to the Commission for the amendment or dismissal of either pleadings or applications pursuant to a settlement agreement shall, at the time of the filing, notify the Commission that such filing is the result of an agreement or understanding. The parties here have complied with the notification requirement that was in effect at the time of the initial application filing. We conclude that the parties' proposed settlement satisfies the requirements of former section 22.29 and that approval of the settlement agreement is in the public interest.

10. We therefore grant Cel-Tel's application requesting authority to provide cellular service in the Missouri 6, Marion RSA. Our grant of Cel-Tel's application is conditioned upon Cel-Tel filing a minor modification application within thirty days of the release of this Order to conform its service area boundary and cellular geographic service area determination to comply with current Commission rule section 22.911. Failure to submit the required modification application in compliance with current section 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 Cel-Tel's authorization under File No. 11019-CL-P-509-A-89.

11. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309(d)(1) of the Communications Act of 1934, 47 C.F.R. §§ 154(i) and 309(d)(1), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petitions to Deny filed by Jefferson Cellular, L.P., on July 29, 1992 and March 5, 2001 ARE DISMISSED.

12. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.331 and 1.106(b)(3) of the Commission's rules, as amended, 47 C.F.R. §§ 0.331 and 1.106(b)(3), the Petition for Reinstatement filed by Jefferson Cellular L.P. on March 2, 2001 IS DENIED.

13. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended 47 U.S.C. §§ 154(i) and 309, and section 0.331 of the Commission's rules, 47 C.F.R. 0.331, the Request for Approval of Settlement Agreement filed by Cel-Tel Communications on July 5, 2000 IS GRANTED.

14. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309(d)(1) of the Communications Act of 1934, 47 C.F.R. §§ 154(i) and 309(d)(1), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition to Deny filed by Applicants Against Lottery Abuses on July 2, 1992 is DISMISSED.

15. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 309, and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the application filed by Cel-Tel Communications (File No. 11019-CL-P-509-A-89) is hereby GRANTED, subject to Cel-Tel filing a minor modification application within thirty days of the release of this Order for the purpose of conforming its service area boundary and cellular geographic service area determination with the requirements of current Commission section 22.911. Failure to submit the required minor modification complying with current section 22.911, 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

⁴² 47 C.F.R. § 22.29 (1988).

authorization, shall result in a set aside of this Order and the automatic cancellation of the authorization under File No.11019-CL-P-509-A-89.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
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