

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

In the Matter of	)	
Certain Cellular Rural Service Area	)	Fee Nos. 9179072, <i>et al.</i>
Applications	)	Fee Nos. 9187470, <i>et al.</i>
	)	
In the Matter of	)	
Cellular Rural Service	)	Fee Nos. 9177648, <i>et al.</i>
Area Applications in Market	)	
Nos. 599A and 672A	)	

**ORDER**

**Adopted:** February 28, 2001

**Released:** March 2, 2001

By the Deputy Chief, Wireless Telecommunications Bureau:

1. In this order, we jointly address: (1) Consolidated Petitions for Reconsideration filed by Miller Communications, Inc., Ranger Cellular, Rural Cellular Communications, Inc., Aztec Cellular Partnership, Talking Towers, Inc., Sunfish Cellular, Inc., Jeffrey K. Ramsey, and Sarah Kathern Ramsey on May 3, 1999 and May 24, 1999; (2) Petitions for Reconsideration filed by High Tower Communications, Inc. on May 3, 1999 and June 1, 1999; and (3) Petitions for Reconsideration filed by the Coalition for Equitable Return of Filing Fees (Coalition) on May 3, 1999 and June 1, 1999 (collectively, "Petitioners"). Petitioners seek reconsideration of two separate orders of the Wireless Telecommunications Bureau (Bureau), released April 2, 1999<sup>1</sup> and April 29, 1999,<sup>2</sup> dismissing all pending applications to provide

<sup>1</sup> In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (1999) (*Dismissal Order I*). *Dismissal Order I* dismissed pending applications for the following six RSA markets: 332A – Polk, Arkansas (AR 9); 370A – Monroe, Florida (FL 11); 492A – Goodhue, Minnesota (MN 11); 582A – Barnes, North Dakota (ND 3); 615A – Bradford, Pennsylvania (PA 4); and 727A – Ceiba, Puerto Rico (PR 5).

<sup>2</sup> In the Matter of Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99-814 (rel. Apr. 29, 1999) (*Dismissal Order II*). *Dismissal Order II* dismissed pending applications for the following two RSA markets: 599A – Nowata, Oklahoma (OK 4) and 672A – Chambers, Texas (TX 21). We subsequently reinstated the applications of Alee Cellular Communications (Alee) and Zephyr Tele-Link (Zephyr) for Market Nos. 599A and 672A, respectively, since they each had been named tentative selectee in the respective RSAs following a second lottery that had been conducted in 1992. In the Matter of Rural Cellular Service Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426 (rel. July 21, 1999). Zephyr was granted the initial authorization for Market No. 599A. In the Matter of Zephyr Tele-Link 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*, DA 00-344 (rel. Feb. 23, 2000). The Alee application was dismissed. In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market (continued....)

cellular radiotelephone service in certain rural service areas (RSAs) (collectively, the *Dismissal Orders*). For the reasons discussed below, we deny Petitioners' requests for reconsideration.

2. In the *Dismissal Orders*, we dismissed all pending cellular radiotelephone applications in eight RSAs for which no initial cellular RSA license had been awarded. No such award had been made in those RSAs either because the initial tentative selectee had been disqualified or because a petition to deny had been granted. In two of those markets, a second lottery had been conducted, leading to a grant of an initial authorization in one of those markets — Market No. 599A.<sup>3</sup> Petitioners filed their applications, which were dismissed by the *Dismissal Orders*, in anticipation of the Commission awarding licenses for these markets by lottery. Petitioners argue that the Bureau's dismissal of the pending RSA applications is improper because the Balanced Budget Act of 1997 does not justify, or require, dismissal of the pending applications,<sup>4</sup> that the Commission was required to hold a second lottery for the RSA markets not yet authorized,<sup>5</sup> and that, if the dismissals are upheld, the application filing fees must be refunded to the applicants.<sup>6</sup>

3. Petitioners' arguments are without merit, and we affirm the dismissal of their applications. First, the requests for reinstatement of applications for initial cellular authorization in RSA No. 599A are dismissed as moot, since a second lottery was held in that market and an initial license was awarded to another applicant (Zephyr). There thus is no authorization for which Petitioners may apply in RSA 599A.

4. Second, the applications all were properly dismissed for the reasons stated in the *Dismissal Orders* and nothing in the petitions warrants reconsideration of those actions. Pursuant to the Balanced Budget Act of 1997, the Commission no longer has authority to use lotteries to select among competing mutually exclusive applicants for initial licenses or construction permits.<sup>7</sup> As explained in the *Dismissal Orders*, Section 3002(a) of the Balanced Budget Act of 1997 states that, with limited exceptions not applicable to this proceeding, "the Commission shall not issue any licenses or permits using a system of

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672, *Memorandum Opinion and Order*, DA 00-276 (rel. Feb. 15, 2000). Alee has filed a petition for reconsideration of that dismissal that remains pending. See Alee Cellular Communications Petition for Reconsideration, File No. 11025-CL-P-672-A-89 (filed Mar. 16, 2000).

<sup>3</sup> See fn. 2, *supra*.

<sup>4</sup> See, e.g., Consolidated Petition for Reconsideration of Miller Communications, Inc., *et al.* (filed May 3, 1999) at 3-4 (May 3 Consolidated Petition); Petition for Reconsideration of High Tower Communications, Inc. (filed May 3, 1999) at 4-5 (High Tower May 3 Petition); Consolidated Petition for Reconsideration of Miller Communications, Inc., *et al.* (filed May 24, 1999) at 3-4 (May 24 Consolidated Petition); Petition for Reconsideration of High Tower Communications, Inc. (filed June 1, 1999) at 4-5 (High Tower June 1 Petition).

<sup>5</sup> See High Tower May 3 Petition at 5-7; High Tower June 1 Petition at 5-7.

<sup>6</sup> May 3 Consolidated Petition at 4-6; May 24 Consolidated Petition at 4-6; Petition for Reconsideration of the Coalition for Equitable Return of Filing Fees (filed May 3, 1999) at 4-7 (Coalition May 3 Petition); Petition for Reconsideration of the Coalition for Equitable Return of Filing Fees (filed June 1, 1999) at 4-7 (Coalition June 1 Petition). We note that the Petitions for Reconsideration of the *Dismissal Orders* filed by the Coalition for Equitable Filing Fees do not substantively address the Bureau's dismissal of the pending RSA applications, and merely request a return of the filing fees paid by the applicants.

<sup>7</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251 (1997) (Balanced Budget Act).

random selection under this subsection after July 1, 1997.”<sup>8</sup> Petitioners’ applications were dismissed without prejudice, and Petitioners will have the opportunity to file applications for cellular authorizations in these RSA markets upon adoption of competitive bidding rules consistent with the Balanced Budget Act.<sup>9</sup>

5. Contrary to their claims, Petitioners were not entitled to a second lottery in which they would be able to participate. Petitioners’ applications were processed consistent with the applicable rules governing the licensing of cellular RSAs. Each application was included as part of the lottery pool for the subject cellular RSA authorizations. Their applications, however, were not selected. Petitioners read section 1.823(a)(3) as it existed when they filed their applications<sup>10</sup> far too broadly. They essentially claim that this rule somehow assured them of a second opportunity to obtain a license without having to go through a new application process.<sup>11</sup> This former rule section does not constitute a substantive “entitlement.” Nor did payment of application fees somehow entitle Petitioners to “receipt” of specified regulatory services.<sup>12</sup> Petitioners simply ignore well-established precedent that an applicant has no vested right to a continuation of the substantive standards in effect at the time its application was filed, whether or not the application has been accepted and achieved cut-off status.<sup>13</sup> Just as Petitioners had no right to be selected as the winner of

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<sup>8</sup> *Id.* at § 3002(a)(2)(B)(5), *codified at* 47 U.S.C. § 309(i)(5).

<sup>9</sup> *See Dismissal Order I*, 14 FCC Rcd at 4621. The Commission recently issued a *Notice of Proposed Rule Making* proposing the adoption of specific rules and policies to govern the licensing of the remaining cellular RSAs pursuant to competitive bidding procedures. *See In the Matter of Competitive Bidding Rules To License Certain Rural Service Areas, Notice of Proposed Rule Making*, FCC 01-36 (rel. Feb. 12, 2001) (*Cellular RSA Competitive Bidding NPRM*). We note that the District of Columbia Appropriations Act of FY 2001 directs the Commission to reinstate the originally named tentative selectees in each of Market Nos. 370A (FL 11), 492A (MN 11), and 615A (PA 4), and to process their applications. District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762, Title X, § 1007, *Launching Our Communities’ Access to Local Television Act of 2000* (2000). Unless the Commission finds one or more of these entities not qualified to be a licensee, there will be no authorizations available in these RSAs for which Petitioners could apply. *See id.* Petitioners’ applications in these markets simply did not succeed to the grant stage. Thus, applications in these markets are properly dismissed for this additional reason.

<sup>10</sup> Section 1.823(a)(3), 47 C.F.R. § 1.823(a)(3), stated:

In the Phase I licensing phase, petitions to deny must be filed within 30 days after the date of public notice announcing the tentative selectee. If the tentative selectee is qualified, the Commission will grant its application and dismiss the losing applications. If the tentative selectee’s application cannot be granted, it will be either designated for hearing or dismissed. If the winning application is dismissed or ultimately denied, another lottery will be held to select an application from the remaining applications.

<sup>11</sup> High Tower May 3 Petition at 6; High Tower June 1 Petition at 6.

<sup>12</sup> High Tower provides no support for its claim that the Commission “promised” to process applications in a certain way in exchange for the payment of application fees. *See* High Tower May 3 Petition at 5; High Tower June 1 Petition at 5.

<sup>13</sup> *See, e.g., Bachow Communications, Inc. v. FCC*, No. 99-1346 (D.C. Cir. Feb. 6, 2001) (upholding dismissal of applications for 39 GHz authorizations as part of transition to market area and competitive bidding-based licensing); Revision of Part 22 and Part 90 of the Commission’s Rules To Facilitate Future Development of (continued....)

the initial lotteries held for these RSA markets, they have no right to have a second lottery conducted without regard to any substantive rule changes affecting their pending applications.

6. While some Petitioners argue that the Bureau should have retained the applications on file to participate in competitive bidding for the subject RSA authorizations, the Bureau acted fully within its authority and jurisdiction to dismiss the applications. The applications are over ten years old, and there is no assurance that the applicants remain valid entities. Moreover, entities that filed an application to secure a place in a lottery competition over ten years ago may or may not wish to pursue the same license in competitive bidding. Rather than undertake a cumbersome amendment and review process, the Bureau had the discretion to dismiss the original lottery applications and to afford currently interested parties a fresh opportunity to submit an application, using current forms and requirements, to participate in the competitive bidding for the respective cellular RSA authorizations.<sup>14</sup> The original lottery applicants would be free to submit new short form applications consistent with the Commission's rules.

7. The *Dismissal Orders* also correctly determined that Petitioners were not entitled to a refund of their filing fees because they had actually participated in the initial lotteries for their respective markets, thus affording them a full opportunity to be selected. Petitioners assert that section 1.1113(a)(4) of the Commission's rules<sup>15</sup> requires a refund and "applies to any post acceptance-dismissal of an application which results from a change in the rules – no matter when that change occurs."<sup>16</sup> We do not find Petitioners' contention persuasive. As set forth in the *Dismissal Orders*, the applications of Petitioners were subject to the full extent of processing as a result of being included in the initial lottery for the authorization for each RSA market prior to the passage of the Balanced Budget Act in 1997. The fact that second lotteries were held prior to the passage of the Balanced Budget Act of 1997 for certain markets in

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\_\_\_\_\_ Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10038, ¶ 8 (1999); *Broadcast Competitive Bidding Rulemaking*, 13 FCC Rcd at 15937, ¶ 44; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4941 (1998), citing *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997).

<sup>14</sup> Miller Communications, Inc., *et al.* (Miller) note that in instances where prior broadcast applications were pending, the Commission has retained the pending applications and permitted the applicants to participate in an auction by filing a short form application. See May 3 Consolidated Petition at 4; May 24 Consolidated Petition at 4, both citing Implementation of Section 309(j) of the Communications Act — Competitive Bidding for Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15959 (1998), *aff'd on recon.*, 14 FCC Rcd 8724 (1999) (*Broadcast Competitive Bidding Order*). This example does not convince us that we should follow a similar procedure here. On the broadcast side, the Commission was statutorily required in many cases to limit participation in the auction to the pending applicants, and therefore retained the pending applications. See *Broadcast Competitive Bidding Order*, 13 FCC Rcd. at 15936, ¶ 43, citing 47 U.S.C. § 309(l)(2). However, the Commission has not proposed that the pool of potential applicants for the RSA licenses be limited to the initial group of applicants, see *Cellular RSA Competitive Bidding NPRM* at ¶ 8, nor does Miller advocate such a limitation. In any event, we see no reason to follow the broadcast procedures because prior applicants who remain interested in the subject authorizations will be free to file new short form applications to participate in the auctions.

<sup>15</sup> 47 C.F.R. § 1.1113(a)(4).

<sup>16</sup> Consolidated Petition at 5. Section 1.1113(a)(4), 47 C.F.R. § 1.1113(a)(4), provides that "[t]he full amount of any fee submitted will be returned or refunded, as appropriate in the following circumstances: ... when the Commission adopts new rules that nullify applications already accepted for filing, or new law or treaty would render useless a grant or other positive disposition of the application."

which the initial tentative selectee was subsequently disqualified does not create a vested right in applicants that second lotteries would be held for all such markets nor mandate the refund of fees under section 1.1113(a)(4).

8. Indeed, the Commission language cited by Petitioners themselves in support of their claims confirms that a refund is not appropriate in this circumstance. Specifically, in an order involving an exception to the Commission's overall policy of retaining application processing fees, the Commission stated that section 1.1111(a)(4) [the earlier version of the subject section] "is intended to apply in those *rare* instances where the Commission creates a new regulation or policy, or the Congress and President approve a new law or treaty, that would make the grant of a pending application a legal nullity."<sup>17</sup> In this case, no new law, treaty, regulation, or policy makes the grant of any given application filed by one of the Petitioners a nullity; the applications could still be granted. Rather, the Commission has only changed the application process itself, which does not determine whether any given application could be granted on its merits.<sup>18</sup>

9. Accordingly, IT IS HEREBY ORDERED, pursuant to sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, that the Consolidated Petitions for Reconsideration filed by Miller Communications, Inc., Ranger Cellular, Rural Cellular Communications, Inc., Aztec Cellular Partnership, Talking Towers, Inc., Sunfish Cellular, Inc., Jeffrey K. Ramsey, and Sarah Kathern Ramsey on May 3 and May 24, 1999, the Petitions for Reconsideration filed by High Tower Communications, Inc. on May 3, 1999 and June 1, 1999, and the Petitions for Reconsideration filed by the Coalition for Equitable Return of Filing Fees on May 3, 1999 and June 1, 1999, ARE DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting  
Deputy Chief, Wireless Telecommunications Bureau

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<sup>17</sup> Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd 947, 950 (1987) (emphasis added).

<sup>18</sup> The Coalition alleged impermissible *ex parte* contacts by counsel for Cellular Communications of Puerto Rico, Inc. (CCPR) in the filing of CCPR's Petition for Declaratory Ruling or, in the Alternative, for Rulemaking, filed on September 9, 1996 (CCPR Petition). See Coalition May 3 Petition at 6; Coalition June 1 Petition at 6. On May 17, 1999, Cellular Communications of Puerto Rico, Inc. submitted comments in response to Coalition's allegations. Since we dismissed the CCPR Petition as moot in *Dismissal Order I*, we find it unnecessary to consider the Coalition's allegations in resolving Petitioners' request for reconsideration.