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

In the Matter of	)	
	)	
County of Genesee, New York	)	WT Docket No. 02-55
	)	Mediation No. TAM-43102
and	)	
	)	
Sprint Nextel Corp.	)	

ORDER

Adopted: November 3, 2011 **Released:** November 3, 2011

By the Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

1. By this *Order*, we dismiss the Motion for Leave to Intervene (Motion), filed October 11, 2011 by Oakland County, Michigan (Oakland).[1] Oakland seeks intervenor status in the captioned proceeding pursuant to Section 1.106(b)(1) of the Commission's rules.[2] We also dismiss Oakland's petition for reconsideration of the Public Safety and Homeland Security Bureau's (Bureau) *Memorandum Opinion and Order* in the Genesee County, New York, proceeding.[3]

I. BACKGROUND

2. On September 9, 2011, the Bureau released a *Memorandum Opinion and Order* in the captioned proceeding in which it determined that the County of Genesee, New York (Genesee) received "comparable facilities" when the 800 MHz Transition Administrator (TA) assigned Genesee replacement frequencies separated by less than 1 MHz from the lower edge of the ESMR Band.[4] Oakland argues that it is similarly situated to Genesee to the extent it is an 800 MHz public safety licensee located in the Canada border area and the TA has assigned Oakland replacement frequencies separated by less than 1 MHz from the lower edge of the ESMR band. Oakland submits, therefore, that it meets the "aggrieved/adversely affected" test for standing.[5] Oakland asserts that it is entitled to intervention because "[t]he Commission has a long history of granting intervention requests when a third party is adversely affected by a Commission decision."[6]

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[1] Sprint Nextel Corp. filed an opposition to the Oakland Motion on Oct. 21, 2011 (Opposition).

[2] 47 C.F.R. § 1.106(b)(1). As noted *infra* the appropriate rule for Motions to Intervene is 47 C.F.R. § 1.223.

[3] County of Genesee, New York and Sprint Nextel, *Memorandum Opinion and Order*, 26 FCC Rcd 12772 (PSHSB 2011).

[4] Both Oakland and Genesee are located in the Canada Border Region which lacks the 1 MHz guard band that exists in non-border areas of the United States.

[5] Motion at 3 *citing* Aspen FM, Inc., *Memorandum Opinion and Order,* 12 FCC Rcd 17852 (1997) (Aspen FM).

[6] *Id. citing* RCN Telecom Services of California, *Order on Reconsideration,* 15 FCC Rcd 9438 (CSB 2000) (RCN); Caloosa Television Corp., *Letter,* 19 FCC Rcd 19556 (MMB 2004); Midwest Bell Communications, *Order on Reconsideration,* 15 FCC Rcd 11005 (WTB 2000); Pacific B'cstg of Missouri, LLC, *Memorandum Opinion and Order*, 19 FCC Rcd 10950 (2004).

II. DISCUSSION

3. We disagree. Section 1.223 of the Commission's rules provides for petitions to intervene only in cases that have been designated for hearing. Of the four cases cited by Oakland for the proposition that the Commission has a "long history" of granting intervention requests, only one – the staff level decision in *RCN* – addresses a request to intervene in a non-hearing proceeding. That staff level case was effectively overruled by *JNE Investments* where the Commission affirmed that intervention requests are permitted only in hearing proceedings.[7] Neither the Genesee nor Oakland proceedings are in hearing status. Thus, Oakland's motion is subject to dismissal. However, we exercise our discretion to treat Oakland's pleading, under Section 1.41 of the Commission's rules,[8] as an informal request to accept its Petition for Reconsideration of the Genesee *Memorandum Opinion and Order*. We conclude that Oakland lacks standing to submit such a petition.

4. *Aspen FM* cited by Oakland as authority for its being aggrieved/adversely affected by the Genesee *Memorandum Opinion and Order* is inapposite here. The facts are not remotely the same. Standing in *Aspen FM* was conferred because, and only because, the petitioner for reconsideration was a broadcaster that would compete with a proposed broadcast assignee for listeners in the Aspen, Colorado market.[9] Here, however, Oakland's only claim for standing is its apprehension that the precedent established by the Genesee *Memorandum Opinion and Order* may affect disposition of Oakland's case should it come before the Public Safety and Homeland Security Bureau for *de novo* review. The controlling Commission case here is *Texas Cable and Telecommunications Assoc. v. GTE Southwest, Inc.*,[10] in which the Commission held that a party's apprehension that its case would be adversely affected by precedent was not sufficient to confer standing to submit a petition for reconsideration.[11]

III. DECISION

5. When evaluating standing, the Commission applies "the same test that courts employ in determining whether a person has standing under Article III to appeal a court order: the person must

[7] JNE Investments, Inc. *Memorandum Opinion and Order*, 23 FCC Rcd 623, 627 (2008) ("The Commission's Rules do not provide for petitions to intervene in non-hearing cases. Accordingly, [movant's] motion is dismissed.") (Footnote omitted.)

[8] 47 C.F.R. § 1.41.

[9] *Aspen FM*, 12 FCC Rcd at 17855, *citing FCC v. Sanders Bros*., 309 U.S. 470 (1940).

[10] Texas Cable and Telecommunications Assoc. v. GTE Southwest, Inc., *Order,* 17 FCC Rcd 6261 (2002).

[11] *Id.* at 6264, *citing Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 (D.C. Cir. 1989) ("[W]e know of no authority recognizing that the mere potential precedential effect of an agency action affords a bystander to that action a basis for complaint."); *Boston Tow Boat Co. v. United States*, 321 U.S. 632, 633 (1944) (interest in precedential effect not sufficient to confer standing). *See also AirTouch Paging v. FCC,* 234 F.3d 815, 819 (2d Cir. 2000), *quoting Sea Land Service, Inc.,* 137 F.3d 640, 648 (D.C. Cir. 2008) ("mere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation"); Ottawa County, Ohio and Sprint Nextel, *Order*, 26 FCC Rcd 2205 (PSHSB 2011). (Procedurally defective petition for reconsideration dismissed. Parties advised "that the expense of preparing and filing procedurally barred pleadings is not recoverable from Sprint as a prudent and necessary rebanding cost."); City of Boston, Mass. and Sprint Nextel Corp., *Order,* 22 FCC Rcd 2361 (PSHSB 2007) (*Boston Order*).

show (a) a personal injury 'in fact'; (b) that the injury is fairly traceable to the challenged action; and (c) that it is likely, not merely speculative, that the requested relief will redress the injury."[12]

6. Oakland fails all three prongs of the conjunctive test for standing. It has not shown that it would suffer an injury in fact if its Motion is not granted. If Oakland is unable to reach agreement with Sprint and the matter is referred to the Bureau for *de novo* review, Oakland's case will be decided on its own facts and merits. As Sprint points out, the Bureau disposed of a similar issue in the *City of Boston* case where it dismissed third party petitions on standing grounds because "the *Boston Order* is limited to the facts presented in the record of that proceeding and does not adversely affect Petitioners."[13] Likewise, an adverse decision, should Oakland pursue *de novo* review, would not be fairly traceable to the *Genesee* decision because Oakland's case would be decided on the Oakland record; not Genesee's. Finally, it is unlikely, indeed speculative, that grant of Oakland's Motion would redress the injury that Oakland perceives. Were we to grant Oakland's motion we would have to consider an Oakland petition for reconsideration that does little more than reprise arguments made in a petition for reconsideration submitted, by the same counsel, in the Genesee proceeding.[14] Considering such a petition would be an unnecessary drain on Commission resources.

7. The law of the case in these *de novo* review proceedings is that the perceived precedential effect of decisions on *de novo* review does not create standing for third parties to submit petitions for reconsideration no matter how foreseeable it may be that similar issues will arise in the petitioner's own case. We so held in the *Boston* case, and reaffirm that principle here. Should third parties, in the future, seek to petition for reconsideration on the basis that a decision on *de novo* review may prejudice their own case, such petitions will be deemed frivolous and will summarily be dismissed. The associated costs in preparing such frivolous pleadings will not be Sprint's responsibility, and the Bureau will consider whether such a filing was made in good faith.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the Motion to Intervene, filed October 11, 2011 by Oakland County, Michigan, considered as such, IS DISMISSED.

9. IT IS FURTHER ORDERED that the Motion to Intervene, filed October 11, 2011 by Oakland County, Michigan, treated as a request for informal Commission action pursuant to Section 1.41 of the Commission's rules, IS DENIED.

10. IT IS FURTHER ORDERED that the Petition for Reconsideration filed October 11, 2011 by Oakland County, Michigan IS DISMISSED.

[12] AT&T Corp. v. Business Telecom, Inc., *Order on Reconsideration*, 16 FCC Rcd 21750, 21751-52 (2001).

[13] Sprint Opposition at 1-2, *quoting Boston Order*, 22 FCC Rcd at 2361.

[14] *Id.* at 2.

11. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
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