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

In re Applications of

Independent Telcos of St. Croix County For Minneapolis/St. Paul MSA General Partnership — File No. 01279-CL-MP-88

For authority to construct a cellular system in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B, for St. Croix County in Market 15, Minneapolis/St. Paul MSA

Minneapolis SMSA Limited Partnership — File No. 01038-CL-MP-88

For authority to modify and add facilities and expand its Cellular Geographic Service Area for Station KNKA 219 in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block B in Market 15, Minneapolis/St. Paul MSA

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1992; Released: January 21, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Before the Common Carrier Bureau are two Petitions for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership (Independent). The first contests the dismissal of Independent's captioned application by the Mobile Services Division (MSD).[1] The second seeks reconsideration of the MSD's grant of the captioned application of Minneapolis SMSA Limited Partnership (Minneapolis LP), the wireline licensee for the Minneapolis-St. Paul, Minnesota/Wisconsin MSA (Minneapolis MSA). For the reasons set forth below, we affirm the MSD's actions on the captioned applications.

II. BACKGROUND

2. On April 19, 1988, prior to the expiration of the five year "fill-in" period for the Minneapolis MSA, Minneapolis LP filed its "fill-in" application to expand its CGSA within the Minneapolis MSA.[2] On May 26, 1988, within sixty days of the public notice listing that application as acceptable for filing, Independent filed its application for a cellular system within the same part of the Minneapolis MSA proposed to be served by Minneapolis LP.[3] On August 9, 1988, the MSD dismissed Independent's application as defective pursuant to Section 22.31(a)(1)(i), because it was filed prior to the end of the "fill-in" period allowed for Minneapolis LP.[4] On September 19, 1988, Independent filed its first petition, contending that the dismissal was in error. Subsequently, on March 28, 1989, the MSD granted the Minneapolis LP application.[5] On April 25, 1989, Independent filed the second petition, requesting that the grant of Minneapolis LP's application be set aside pending action on the first petition, or, in the alternative, conditioned upon a final order of the Commission and judicial review of the dismissal of Independent's application. Both parties filed responsive pleadings.

3. For the top 30 MSAs, including the Minneapolis MSA, the Commission announced that applicants must file their initial cellular applications by a date certain, *viz.*, June 7, 1982. *Cellular Communications Systems*, 89 FCC 2d 58, 87-94, *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. 1983). Neither Independent nor any of its individual wireline partners filed an initial MSA application by that date. The Commission reiterated this date certain filing policy in the *Cellular Lottery Rule Making*, 98 F.C.C. 2d 175, 203-04 & n.81 (1984), *aff'd*, *Cellular Radio Service (Lottery Selection)*, 58 Rad. Reg. 2d (P&F) 677, 688 (1985). However, pursuant to Sections 22.903(d) and 22.913(a) of the rules, cellular permittees or licensees were allowed to modify existing authorizations by filing to expand their initial CGSAs, but the Commission stated that it would not permit mutually exclusive applications to be filed against those "fill-in" applications during the initial nationwide licensing period. *Cellular Lottery Rule Making*, 98 F.C.C. 2d at 204 n.81.

4. Subsequently, the Commission dismissed as "untimely filed" a competing application that had been filed by La Star Cellular Telephone, Inc. (La Star) within the sixty day period provided by the Commission's cut-off rule, Section 22.31(b), against the "fill-in" application of the initial wireline licensee in the New Orleans MSA.[6] *See New Orleans CGSA, Inc.*, FCC 85-209 (released May 6, 1985). The Commission's dismissal of the La Star application was set aside on appeal. *Maxcell Telecom Plus, Inc. v. FCC (Maxcell)*, 815 F.2d 1551 (D.C. Cir. 1987). The court determined that the Commission's orders prior to the 1984 order in *Cellular Lottery Rule Making*, 98 F.C.C. 2d at 204 n.81, had not provided adequate notice to La Star that applications filed after June 7, 1982 in response to fill-in applications would be deemed "untimely filed." *Maxcell*, 815 F.2d at 1556-1559. The court ordered reinstatement of La Star's application *nunc pro tunc*. *Id.*

5. Pending the appeal by La Star, the Commission initiated a notice and comment Rule Making proceeding to determine whether it should allow non-licensees to file applications competing with licensees' fill-in applications. *See Further Notice of Proposed Rule Making*, 1 FCC Rcd 499 (1986) (NPRM). Subsequent to the ruling in *Maxcell*, the Commission adopted Section 22.31(a)(1)(i) of the rules, providing for a five year period protecting the "fill-in" applications of licensees from competing applications. *Second Report and Order, CC Docket No. 85-388*, 2 FCC Rcd 2306 (1987), *modified in part, Order on Reconsideration of Second Report and Order (Reconsideration of Second Report and Order)*, 4 FCC Rcd 5377 (1989), *petition for review pending, Amery Telephone Company, et. al. v. FCC*, No. 89-1524 (D.C. Cir., filed Sept. 1, 1989).

III. DISCUSSION

6. In its first petition, Independent argues that this case is like La Star's, because it, too, filed an application to compete with the "fill-in" application of an existing licensee. Independent asserts that the court in *Maxcell* found that because the Commission had not announced prior to the date certain for filing initial MSA applications its "fill-in" policy prohibiting competing applications, La Star did not receive sufficient notice that it might lose the ability to choose whether to file an initial MSA application prior to the date certain or a competing application later. *See Maxcell,* 815 F.2d at 1560. Independent says that it is in the same position as La Star, and that it did not receive sufficient notice either. It argues that the MSD's dismissal of its application is contrary to what it perceives as the *Maxcell* holding, that the date certain cut-off policy could not be applied to an applicant filing a competing application. Independent further contends that the Commission's adoption of the five year period in Section 22.31(a)(1)(i) in a Rule Making proceeding, *Second Report and Order,* 2 FCC Rcd 2306, did no more to give Independent meaningful notice of the choice it would have to make prior to the date certain for filing initial applications than did the 1984 *Cellular Lottery Rule Making,* 98 F.C.C. 2d at 204 n.81.

7. Minneapolis LP responds that Independent, unlike La Star, no longer had a basis to file its application, because Independent filed its competing application after Section 22.31(a) was amended. The *Maxcell* decision, argues Minneapolis LP, did not curtail the discretion that the Commission has to change its application filing rules and apply those rules prospectively. *Multi-State Communications, Inc. v. FCC, (Multi-State)* 728 F. 2d 1519 (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1017 (1984).

8. The Commission has already addressed contentions, such as those Independent makes, of insufficient notice of the change in filing procedures to parties that seek to file competing applications. *Reconsideration of Second Report and Order,* 4 FCC Rcd at 5378. The Commission stated that *Maxcell* held only that the Commission had not given adequate notice of the date certain for filing cut-off procedure and that an application could not be dismissed as untimely filed for failure to comply with that procedure. *Id.* The Commission rejected the argument that *Maxcell* requires it to accept applications that might be filed subsequent to the Rule Making proceeding to compete with an existing licensee's "fill-in" application. *Id.*

9. With regard to Independent, which filed its competing application subsequent to the Rule Making proceeding, the holding in *Maxcell* is inapposite. The court in *Maxcell* did not address the question of whether, through a notice and comment Rule Making proceeding, the Commission could adopt filing requirements that would render certain prospective applicants ineligible to apply. *See Reconsideration of Second Report and Order,* 4 FCC Rcd at 5378. The Commission's authority to take such action is well-established. *See Storer Broadcasting Co. v. FCC (Storer),* 351 U.S. 192 (1956). Because Section 22.31(a)(1)(i) was adopted pursuant to a notice and comment Rule Making, there was explicit notice of the impact of the rule on potential MSA applicants. Thus, the rule could apply prospectively, even to applicants who had not filed an initial application in the top 90 MSAs and would be frustrated in their attempts to file competing applications against "fill-in" applications by existing licensees. *See Reconsideration of Second Report and Order,* 4 FCC Rcd at 5378, *citing Multi-State,* 728 F.2d 1519.[7] We find that Independent falls within this category. Independent had not filed an initial application for the Minneapolis MSA (*see supra,* para. 3) and only filed a competing application against the fill-in application for the Minneapolis MSA well after the effective date of Section 22.31(a)(1)(i).[8] Therefore, the MSD properly applied this rule in rejecting Independent's application.

10. In view of the foregoing, we need address only briefly Independent's second petition. Independent suggests that the grant of Minneapolis LP's application will prejudice the outcome of its first petition and subsequent review. Our determination herein rejecting reinstatement of Independent's application moots the second petition. See para. 2, supra.

IV. ORDERING CLAUSES

11. Accordingly, the Petition for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership of the dismissal of its application, File No. 01279-CL-MP-88, IS HEREBY DENIED and the DISMISSAL of the application by the Mobile Services Division IS AFFIRMED.

12. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by Independent Telcos of St. Croix County for Minneapolis/St. Paul MSA General Partnership of the grant of the application of Minneapolis SMSA Limited Partnership, File No. 01038-CL-MP-88, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone,
Chief, Common Carrier Bureau

FOOTNOTES

[1] At the time the applications in this case were filed, Section 22.31 (a)(1)(i) provided that ". . . applications by other than licensees or permittees for a . . . Metropolitan Statistical Area (MSA) to serve unserved areas outside the presently authorized CGSA [Cellular Geographic Service Area] but within the MSA are prohibited from being filed and will not be considered as mutually exclusive with a licensee's or permittee's application filed under 22.903(d) herein until five years from the date of the first construction permit granted in that MSA." 47 C.F.R. § 22.31 (a)(1)(i).

[2] The Commission granted Minneapolis LP's initial wireline construction authorization on June 6, 1983. *See Advanced Mobile Phone Service, Inc. et al.,* Mimeo No. 4567 (Com.Car.Bur. 1983).

A "fill-in" application is an application filed by the initial licensee or grantee, after receiving initial construction authorization, to serve an area within the MSA but outside the authorized CGSA. This area is termed an "unserved area", as referred to in Section 22.31(a)(1)(i).

[3] *See* Public Notice, Mimeo 2775 (released April 29, 1988).

[4] The MSD initially granted Independent's application. *See* Public Notice, Mimeo 4059 (released August 8, 1988). The MSD found the grant in error and rescinded it. *See* Letter from Chief, MSD, to Robert M. Jackson, counsel for Independent (August 9, 1988).

[5] *See* Public Notice, Report No. CL-89-117 (released March 28, 1989).

[6] Pursuant to Section 22.31(b), the cut-off period for filing a conflicting application is sixty days after the date of public notice announcing the first-filed application as acceptable for filing, or one business day before final action by the Commission on the first application. *See* 47 C.F.R. §22.31(b).

[7] Moreover, the Commission fully explained the change in the eligibility criteria effectuated by the rule, as required by *Storer,* 351 U.S. at 205. *See Reconsideration of Second Report and Order,* 4 FCC Rcd at 5378-79. Further, Independent's contention that the dismissal of its application is inconsistent with *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945) overlooks that the court in *Maxcell* noted that *Ashbacker* does not apply to prospective applicants. *See Maxcell,* 815 F.2d at 1561, *citing Reuters, Ltd. v. FCC,* 781 F.2d 946, 951 (D.C. Cir. 1986).

[8] Amended Section 22.31 has been applied as effective on June 5, 1987. *See Reconsideration of Second Report and Order,* 4 FCC Rcd at 5382 n.16.