

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

In re Application of

DANNY'S TWO WAY            File No. 24956-CD-P/01-90  
COMMUNICATIONS, INC.  
d/b/a DANN  
COMM PAGING

For facilities in the Public Land Mobile  
Service at Middletown, Ohio

**MEMORANDUM OPINION AND ORDER**

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

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION**

1. Danny's Two Way Communications, Inc., d/b/a Dann Comm Paging (Danny's), has filed a Petition for Reconsideration requesting that the order of the Chief, Mobile Services Division's (MSD) in *Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging*, 6 FCC Rcd 3550 (1991) (*MSD Order*), which dismissed Danny's application, be overturned. USA Mobile Communications, Inc. II (USA Mobile) filed an opposition. For reasons set forth below, we deny Danny's petition.

**II. BACKGROUND**

2. Danny's filed an application to establish facilities on frequency 152.66 MHz at Middletown, Ohio. USA Mobile sought dismissal, claiming that it was already licensed for that frequency at Middletown. Danny's responded that USA Mobile's authorizations had expired by law under Section 22.303 of the Commission's rules<sup>1</sup> because the frequency at Cincinnati had been abandoned. USA Mobile replied that it previously notified the Commission that it had deleted its Cincinnati location but that it remained active at Middletown, West Chester, and Dayton. In its decision, the MSD noted that a license terminates only after the Commission takes formal action, and USA Mobile's authorization at Middletown had not been terminated. It concluded, therefore, that the frequency was not available for reassignment. The MSD dismissed Danny's application without prejudice but directed USA Mobile to provide additional information in response to Danny's allegations of abandonment.

3. In its petition for reconsideration, Danny's argues that nothing in Section 22.303 suggests that independent Commission action is necessary to terminate a license. Danny's asserts that in *Notice of Proposed Rule Making*, PR Docket No. 90-481, 5 FCC Rcd 6401 (1990) (*NPRM*), the Commission construed virtually identical language of Section 90.157 of the Commission's rules (which involves Private Land Mobile Services) to effect an automatic license termination without a separate act by the Commission to cancel. Danny's thus asserts that the MSD's action

is opposite of the Commission's conclusion in the *NPRM* that a "finder's preference" be adopted to provide incentives in helping to recover spectrum previously licensed but unused.

4. USA Mobile's opposition to Danny's petition contends that the "finder's preference" is merely a proposal under Commission consideration which has not yet been adopted and, furthermore, the "finder's preference" would apply only after the Commission completed any necessary inquiries and revoked or cancelled the existing license. In any event, USA Mobile further argues that the Common Carrier Bureau has not considered the *NPRM* and, moreover, it is inapplicable to this proceeding.

5. In reply, Danny's asserts that the Commission has definitely construed Section 90.157 in accordance with Danny's position, contrary to the *MSD Order*, and because Section 90.157 language is virtually identical to Section 22.303, the MSD is bound, regardless of its past practice. Danny's emphasizes that the Commission has determined that some sort of "finder's preference" is warranted in land mobile services and that only the specific mechanics are involved in the *NPRM*, not the concept of a "finder's preference."

**III. DISCUSSION**

6. Danny's raises two issues. The first is whether a PLMS permit is terminated only on release of a Commission Public Notice. The second is whether the policies set forth in the *NPRM* apply to DPLMS licenses. Section 22.303 does not provide that an authorization automatically expires upon abandonment of a station. Indeed, the rule requires that the licensee must forward the authorization to the Commission so that it can be cancelled. Therefore, until the Commission terminates the authorization, such as by issuance of a public notice, the authorization remains in effect and the frequency is unavailable to others. Danny's second argument regarding the *NPRM* fails on two grounds. First, the *NPRM* by its own terms applies to Part 90 licensees, not Part 22 licensees. Second, a notice of proposed rule making generally does not impose new procedural requirements, and does not operate to dispense with current practices founded on existing rules or policies.<sup>2</sup> For these reasons, we reject Danny's arguments and affirm the MSD's decision below.

**IV. ORDERING PARAGRAPH**

7. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed by Danny's Two Way Communications, Inc. d/b/a Dann Comm Paging, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone  
Chief, Common Carrier Bureau

## FOOTNOTES

<sup>1</sup> Section 22.303 provides

If a station licensed under this part discontinues operation on a permanent basis, the licensee shall forward the station license to the Commission for cancellation. For the purposes of this section, any station which has not operated for 90 continuous days is considered to have been permanently discontinued, unless the applicant has notified the Commission otherwise prior to the expiration of the 90 day period and provided a date when operation will resume, which shall not be in excess of 30 additional days.

<sup>2</sup> As noted above, the MSD directed USA Mobile to provide additional information in view of Danny's allegations in the proceeding below. Whether or not the Commission finds that USA Mobile's use of the frequency 152.66 MHz was in compliance with the Commission's rules is not relevant to a determination of whether Danny's application was defective. If, as a result of the inquiry, the Commission takes some future action concerning USA Mobile's license, Danny's may have an opportunity to apply for that frequency in the future.