

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

In re Application of

JAYBAR  
COMMUNICATIONS

File No. 01885-CL-MP-91

For modification of facilities in  
the Domestic Public Cellular  
Telecommunications Radio Service  
on Frequency Block A, in Market 323  
Arizona 6 - Graham

In re Application of

DATA  
CELLULAR SYSTEMS

File No. 01239-CL-MP-91

For modification of facilities in  
the Domestic Public Cellular  
Telecommunications Radio Service  
on Frequency Block A, in Market 345,  
California 10 - Sierra

In re Application of

ALPHA CELLULAR

File No. 02370-CL-MP-92

For modification of facilities in  
the Domestic Public Cellular  
Telecommunications Radio Service  
on Frequency Block A, in Market 410  
Indiana 8 - Brown

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 16, 1992; Released: January 23, 1992**

By the Deputy Chief, Mobile Services Division:

**I. INTRODUCTION**

1. Jaybar Communications (Jaybar), Data Cellular Systems (Data) and Alpha Cellular (Alpha) filed FCC Form 401 applications to modify their nonwireline cellular systems serving the Graham, Arizona 6 Rural Service Area (RSA) (market number 323A) (Station KNKN251),<sup>1</sup> the Sierra, California 10 RSA (market number 345A) (Station KNKN250)<sup>2</sup> and the Brown, Indiana 8 RSA (market number 410) (Station KNKN340), respectively.<sup>3</sup> The Committee for a Fair Lottery and Thomas Domencich (hereinafter jointly CFL) filed petitions requesting that the Commission (1) dismiss the applications without prejudice, (2) hold further processing of the applications in abeyance pending a resolution of the outstanding issues in *Algleg Cellular Engineering*, CC Docket Number 91-142, 6 FCC Rcd 2921 (Com. Car. Bur. 1991) (risk sharing pro-

ceeding or designation order)<sup>4</sup> or (3) add the applications to the risk sharing proceeding. Applicants Against Lottery Abuses (AALA) filed a petition requesting that the Commission either deny Alpha's application or hold further processing of Alpha's application in abeyance pending a resolution of the outstanding issues in the risk sharing proceeding. Responsive pleadings were filed. Because CFL and AALA's petitions raise similar issues, we are considering all of their petitions in this order. For the reasons set forth below, we will conditionally grant Jaybar, Data and Alpha's applications and deny CFL and AALA's petitions.

**II. DISCUSSION**

2. CFL and AALA contend that Jaybar, Data and Alpha's applications are ungrantable under Section 309(a) of the Act<sup>5</sup> because their qualifications to hold a Commission license are at issue in the pending risk sharing proceeding. Also, CFL asserts that because the Bureau consolidated other previously-filed modification applications<sup>6</sup> with the risk sharing proceeding, granting the instant applications would be "an 'end run' around the clear intent of the Bureau regarding system modifications during the pendency of the revocation proceeding." See CFL petitions at 3. Jaybar, Data and Alpha argue that they were found qualified to be Commission licensees when their authorizations were granted and the designation order did not suspend their authorizations to operate their cellular systems. Alpha also argues that a grant of its application will serve the public interest and will not influence the outcome of the risk sharing proceeding.

3. The Commission has determined that there is an immediate and pressing need for nationwide high quality cellular service.<sup>7</sup> Deferring action on the instant applications pending the resolution of the risk sharing proceeding would frustrate the public's interest in expeditiously receiving cellular service and the Commission's goal to provide excellent service to the public in the most timely manner possible. Further, a grant with conditions would not prejudice the outcome of the risk sharing proceeding and would improve service to the subscribers in the encompassed markets. Therefore, we find that it is in the public interest under Section 309(a) of the Act to grant Jaybar, Data and Alpha's applications conditioned upon any action that may be taken and/or findings that are made by the Commission in the risk sharing proceeding.

**III. ORDERING PARAGRAPHS**

4. Accordingly, IT IS ORDERED that the petitions filed by The Committee for a Fair Lottery and Thomas Domencich against Jaybar Communications, Data Cellular Systems and Alpha Cellular ARE DENIED.

5. IT IS FURTHER ORDERED that the petition filed by Applicants Against Lottery Abuses against Alpha Cellular IS DENIED.

6. IT IS FURTHER ORDERED that the applications of Jaybar Communications (File Number 01885-CL-MP-91), Data Cellular Systems (File Number 01239-CL-MP-91) and Alpha Cellular (File Number 02370-CL-MP-92) ARE GRANTED, conditioned upon any action that may be taken and/or findings that are made by the Commission in CC Docket Number 91-142.

7. This Order is issued under Section 0.291 of the rules and is effective upon release. Petitions for reconsideration under Section 1.106 of the rules or applications for re-

view under Section 1.115 of the rules may be filed within thirty days of the public notice of this Order. *See* 47 C.F.R. §1.4(b)(2).

tions for unserved areas in the Cellular Service and to modify other cellular rules (First Report and Order and Memorandum Opinion and Order on Reconsideration), 6 FCC Rcd 6185 (1991).

#### FEDERAL COMMUNICATIONS COMMISSION

Myron C. Peck  
Deputy Chief, Mobile Services Division  
Common Carrier Bureau

#### FOOTNOTES

<sup>1</sup> *See* Public Notice, Report No. CL-92-5 at 4 (released October 9, 1991); *see also* Jaybar application, engineering statement at 1 (Jaybar proposes to modify an existing cell and add two cells).

<sup>2</sup> *See* Public Notice, Report No. CL-91-200 (released August 30, 1991); *see also* Data application, Exhibit 1 ("Data proposes to construct one additional cell site and to modify the Cellular Geographic Service Area (CGSA)").

<sup>3</sup> *See* Public Notice, Report No. CL-92-17 (released November 12, 1991); *see also* Alpha application, engineering statement at 2 (Alpha proposes to modify two existing cells and add six cells).

<sup>4</sup> In its designation order, the Bureau, *inter alia*, ordered Jaybar, Data and Alpha to show cause why their authorizations for market numbers 323A, 345A and 410A, respectively, should not be revoked under Section 312(a) of the Communications Act of 1934, as amended (the Act) for violation of Sections 22.33, 22.921 and 22.922 of the Commission's rules. *See* Designation Order at 2928 ("[t]he hearing will include inquiry into all the facts and circumstances of . . . [Jaybar, Data and Alpha's] actions or involvement with regard to" agreements styled as "Mutual Contingent Risk Sharing Agreements" and "allow . . . [the Administrative Law Judge] to evaluate . . . whether they are qualified to retain their authorizations"). Sections 22.33, 22.921 and 22.922 prohibit partial settlement agreements among nonwireline RSA applicants, multiple ownership interests in competing nonwireline RSA applications and the transfer of interests in pending applications, respectively.

<sup>5</sup> Section 309(a) provides that

[t]he Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 308(a) provides that "[t]he Commission may grant construction permits and station licenses, or modifications . . . thereof, only upon written application . . . ."

<sup>6</sup> *See* Designation Order at 2930 fn. 5.

<sup>7</sup> *See* An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, Report and Order, 86 FCC 2d 469, 489, 490 (1981), *modified*, 89 FCC 2d 571 (1982), *appeal dismissed sub nom* United States v. FCC, No. 82-1526 (D.C. Cir. 1983); *see also* Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applica-