

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

In re Applications of	)		
	)		
ARTHUR PATRICK d/b/a	)	File Nos.	31591-CD-P/ML-96
MOBILE PHONE OF OKLAHOMA	)		31592-CD-P/ML-96
	)		
For Facilities under Station KNKG730 on	)		
Frequency 931.1375 MHz in the Paging	)		
And Radiotelephone Service in Archer City	)		
And Megargel, Texas	)		

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 19, 2001**

**Released: May 16, 2001**

By the Commission:

**I. INTRODUCTION**

1. This order addresses an Application for Review filed by Metrocall USA, Inc. (“Metrocall”), successor-in-interest to Contact Communications Inc. (“Contact”).<sup>1</sup> Metrocall seeks Commission review of an action taken by the Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch (Branch), which denied Contact’s petition for reconsideration of the above-captioned grants of paging authorization to Arthur Patrick d/b/a Mobile Phone of Oklahoma (Mobile Phone). For the reasons discussed below, we dismiss Metrocall’s Application for Review as moot.

**II. BACKGROUND**

2. On July 29, 1996, Mobile Phone filed applications requesting authorization for the above-captioned facilities.<sup>2</sup> The applications were placed on public notice on August 21, 1996 and on October 4, 1996, Contact filed a competing application requesting authorization for a

<sup>1</sup> See Application for Review filed by Metrocall, Inc. on March 1, 2000 (Application for Review).

<sup>2</sup> Public Notice, Report No. NCS-96-42 (Aug. 21, 1996). Mobile Phone’s applications were filed pursuant to interim licensing rules (Interim Rules), adopted in WT Docket No. 96-18, that permitted incumbent licensees to file initial applications to add new sites that were located within 65 kilometers (40 miles) of an authorized site for which an application had been filed as of September 30, 1995. The authorized site must have been operational as of the date the applications for additional site(s) were filed. The applications would be placed on public notice and subjected to competing applications, for 931 MHz applications, filed within 60 days. See Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *First Report and Order*, 11 FCC Rcd 16570, 16583-84, 16589, ¶¶ 26, 41 (1996) (*Paging First Report and Order*), modified, Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, *Order on Reconsideration of First Report and Order*, 11 FCC Rcd 7409, 7411, ¶ 4 (1996).

new 931.1375 MHz facility at Breckenridge, Texas.<sup>3</sup> On May 21, 1997, the Division granted Mobile Phone's above-captioned applications.<sup>4</sup> On December 14, 1998, the Commercial Wireless Division dismissed Contact's Breckenridge application<sup>5</sup> as required by the Commission's *Paging Second Report and Order*.<sup>6</sup> On January 31, 2000, the Branch denied Contact's Petition for Reconsideration of the grant of Mobile Phone's applications, stating that Contact's application was filed on October 4, 1996, after the July 31, 1996 cut-off for filing paging license applications, and was therefore subject to dismissal pursuant to the *Paging Second Report and Order*.<sup>7</sup>

3. In its Application for Review, Metrocall asserts that the grant of the above-captioned Mobile Phone applications, the dismissal of Contact's Breckenridge application, and the subsequent denial of Contact's petition for reconsideration conflict with the Commission's stated policy for interim paging licensing procedures in WT Docket No. 96-18, which were adopted in conjunction with the Commission's conversion from site-by-site licensing of paging channels to geographic area licensing.<sup>8</sup> Metrocall states that Contact's Breckenridge application and Mobile Phone's applications were mutually exclusive and that Contact timely filed its competing Breckenridge application within 60 days after public notice of the acceptance of Mobile Phone's applications.<sup>9</sup> Metrocall argues that because Contact's Breckenridge application and Mobile Phone's applications were mutually exclusive, Mobile Phone's applications could not properly be granted, and both Contact's and Mobile Phone's applications should have been dismissed pursuant to the Commission's *Paging Second Report and Order*.<sup>10</sup> Further, Metrocall argues that the Branch erred in dismissing Contact's application for the stated reason that it was filed after July 31, 1996, because Contact's application was not a 40-mile expansion application required to be filed by the July 31, 1996 cut-off. Rather, Metrocall contends that Contact's application was filed as a mutually exclusive competing application, which was required to be filed within 60 days of the public notice of the receipt of a 40-mile expansion application.<sup>11</sup>

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<sup>3</sup> Public Notice, Report No. NCS-97-03 (Oct. 16, 1996).

<sup>4</sup> Public Notice, Report No. NCS-97-34-A (May 21, 1997).

<sup>5</sup> See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Order*, 14 FCC Rcd 700 (1998).

<sup>6</sup> See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications – Competitive Bidding, *Second Report and Order*, 12 FCC Rcd 2732 (1997) (*Paging Second Report and Order*).

<sup>7</sup> Commission records indicate that Mobile Phone filed an Opposition to Contact's Petition for Reconsideration but did not file an Opposition to the Application for Review. The Certificate of Service attached to Metrocall's Application for Review reflects that counsel for Mobile Phone was served with a copy of the Application for Review on March 1, 2000.

<sup>8</sup> Application for Review at 2-3.

<sup>9</sup> Application for Review at 5-6.

<sup>10</sup> Application for Review at 7-8, 10.

<sup>11</sup> Application for Review at 5-6.

### III. DISCUSSION

4. We find that Metrocall's Application for Review is moot because Mobile Phone's authorizations automatically terminated on May 21, 1998 for failure to construct and commence service within one year, as required by former section 22.142 of the Commission's rules, which was in effect at the time Mobile Phone's facilities were authorized.<sup>12</sup> Pursuant to that rule, Mobile Phone had one year from the May 21, 1997 grant of its licenses to construct its facilities and commence service to subscribers, or the licenses would cancel automatically.<sup>13</sup> Commission records indicate that Mobile Phone failed to construct or commence service by the May 21, 1998 deadline.<sup>14</sup> Accordingly, Mobile Phone's licenses automatically cancelled as of that date, causing Metrocall's challenge to the initial grant of those licenses to become moot.

5. In order to ensure that our rules and procedures are correctly applied in other cases, however, we also clarify that we would have granted Metrocall's Application for Review even assuming that Mobile Phone licenses had not cancelled for non-construction. We agree with Metrocall that: 1) the grant of the above-captioned Mobile Phone applications was in error; and 2) the Branch's stated reason for the dismissal of Contact's Breckenridge application, *i.e.* that it was filed after the July 31, 1996 cut-off for 40-mile expansion applications, was also in error. We describe the basis for these conclusions below.

6. In the *Notice of Proposed Rulemaking* in WT Docket No. 96-18, the Commission suspended acceptance of new paging applications in anticipation of its conversion from site-by-site licensing to geographic area licensing of paging facilities.<sup>15</sup> In the *Paging First Report and Order*, the Commission announced that it would resume acceptance of applications for additional transmission sites on a primary basis if the applicant complied with the interim rules adopted in that order that allowed incumbents to add "expansion" sites within 40 miles of existing sites.<sup>16</sup>

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<sup>12</sup> 47 C.F.R. § 22.142 (1997). Former section 22.142 was consolidated into current Commission rule section 1.946, 47 C.F.R. § 1.946, as part of the implementation of the Universal Licensing System rules. *See* Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21027 (1998). Former section 22.142 and current section 1.946 provide that if a licensee fails to commence service by the expiration of its construction period, its license terminates automatically, without specific Commission action.

<sup>13</sup> *See* 47 C.F.R. § 22.511.

<sup>14</sup> Commission records do not reflect that Mobile Phone filed the required notification of construction and commencement of service to subscribers, which was required to be filed within 15 days of commencement of service. *See* former rule section 22.142 (b), 47 C.F.R. § 22.142 (b) (1997). Commission records also do not reflect that Mobile Phone filed a request for an extension of the applicable construction period.

<sup>15</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications – Competitive Bidding, WT Docket No. 96-18, FCC 96-52, *Notice of Proposed Rulemaking*, 11 FCC Rcd 6 (1996).

<sup>16</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems and Implementation of Section 309(j) of the Communications – Competitive Bidding, WT Docket No. 96-18, FCC 96-183, *First Report and Order*, 11 FCC Rcd 16570, ¶ 26 (1996). To comply with the interim rules, the applicant was required to: 1) be an incumbent paging licensee on a non-nationwide CCP channel... and (2) certify that the proposed site was within 40 miles of an authorized transmission site that

Applications which complied with these criteria were to be placed on public notice and made subject to competing applications within the applicable filing window.<sup>17</sup> While expansion applications were only accepted from incumbents meeting the expansion criteria, no limit was placed on the eligibility to file competing applications.<sup>18</sup> Further, if a competing application was accepted for filing, both applications were to be treated as mutually exclusive and held in abeyance until the conclusion of the paging proceeding.<sup>19</sup> Subsequently, in the *Paging Second Report and Order*, the Commission announced that it would dismiss all pending mutually exclusive paging applications and all paging applications filed after July 31, 1996.<sup>20</sup>

7. Based on our review, it is clear that the Commission's intent, as expressed in the *Paging First Report and Order* as well as a public notice released on May 10, 1996,<sup>21</sup> was to allow for the consideration of unrestricted competing applications filed in response to the 40-mile expansion applications. Also, as further clarified in a public notice released on June 10, 1996,<sup>22</sup> the Commission intended to process all initial paging applications accepted through July 31, 1996, as well as any timely-filed competing applications. We find that competing applications were not required to be filed by the July 31, 1996 cut-off, which was only applicable to the filing of initial 40-mile expansion applications. Contact's Breckenridge application was timely filed as a competing application to the above-captioned Mobile Phone applications, as it was filed within 60 days of the public notice of Mobile Phone's applications. Thus, we conclude that the Branch erred in granting Mobile Phone's above-captioned applications seeking authority for 40-mile expansion. Contact's Breckenridge application should have been processed as a competing application filed in response to an initial 40-mile expansion application, rather than as an initial 40-mile expansion application filed after July 31, 1996. As required in the *Paging Second Report and Order*, both Contact's and Mobile Phone's mutually exclusive applications should have been dismissed as pending mutually exclusive applications.

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was licensed to the same applicant on the same channel on or before February 8, 1996, and which was operational as of the date the application for the additional transmitter site was filed.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Second Paging Report and Order* at 2739-40, ¶ 6. See also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Order*, 14 FCC Rcd 700 (1998).

<sup>21</sup> Public Notice, DA 96-749 (May 10, 1996).

<sup>22</sup> Public Notice, DA 96-930 (June 10, 1996).

8. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and sections 0.331 and 1.115 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.115, the Application for Review filed by Metrocall USA, Inc. on March 1, 2000 IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary