

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

In the Matter of Applications of	)	
	)	
SAGIR, INC.	)	File No. 01558-CL-MP-95
	)	
For the Modification of Domestic Public	)	
Cellular Station KNKN383 in the Nebraska 1 -	)	
Sioux Rural Service Area, Market No. 533A	)	
	)	
N.E. COLORADO CELLULAR, INC.	)	File No. 10189-CL-P-1533-A-94
	)	
For Authority to Establish a New Station	)	
in the Cellular Radiotelephone Service	)	
in the Nebraska 1 – Sioux Rural Service Area,	)	
Market No. 533A as a Phase I Unserved Area	)	
Applicant	)	
	)	
N.E. COLORADO CELLULAR, INC.	)	File No. 0000086223
	)	
For Authority to Establish a New Station	)	
in the Cellular Radiotelephone Service	)	
in the Nebraska 1 – Sioux Rural Service Area,	)	
Market No. 533A as a Phase II Unserved Area	)	
Applicant	)	
	)	
N.E. COLORADO CELLULAR, INC.	)	File No. 0000599542
	)	
For Authority to Establish a New Station	)	
in the Cellular Radiotelephone Service	)	
in the Nebraska 1 – Sioux Rural Service Area,	)	
Market No. 533A as a Phase II Unserved Area	)	
Applicant	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 17, 2003**

**Released: July 23, 2003**

By the Commission:

**I. INTRODUCTION**

1. In this Memorandum Opinion and Order, we consolidate and resolve two related petitions for reconsideration and a pending cellular radiotelephone service (cellular) unserved area application filed by N.E. Colorado Cellular, Inc. (NECC) and opposed by Sagir, Inc. (Sagir). For the reasons stated below, we dismiss both of NECC's reconsideration petitions in part and otherwise deny the petitions, and we dismiss NECC's unserved area application as defective.

## II. BACKGROUND

2. These matters arise from NECC's challenge of the Wireless Telecommunications Bureau's (Bureau) April 7, 1995 grant of a modified cellular license to Sagir for the Nebraska 1 – Sioux RSA (Sioux RSA), Market 533A, and the Bureau's dismissals of conflicting unserved area applications filed by NECC. The 1995 license modification expanded the contours of Sagir's cellular geographic service area (CGSA) for the Sioux RSA based on its filing of an alternative CGSA showing pursuant to the Commission's cellular licensing rules.<sup>1</sup> NECC, a licensee holding *inter alia* the immediately adjacent Colorado 2 – Logan RSA, Market 349A, cellular license, claims that the Commission should reconsider the 1995 modification and redraw Sagir's CGSA back to its original contours based on the Commission's primary method for CGSA determinations.<sup>2</sup> NECC has filed three unserved area applications in succession that overlap portions of Sagir's modified CGSA, claiming that these areas within the CGSA are not reliably served by Sagir and therefore constitute "unserved areas" available for licensing under the Commission's unserved area licensing process.<sup>3</sup>

3. In a prior order, we upheld the Bureau's grant of the modified Sioux RSA license to Sagir and its dismissal of NECC's first application, a Phase I unserved area application filed in 1994.<sup>4</sup> In the first petition now before us, NECC seeks reconsideration of the *Sagir I MO&O* on the basis of purported new facts regarding Sagir's qualifications and compliance with Commission transfer of control rules that NECC has raised in a separate, unrelated challenge to the pending renewal of Sagir's cellular license for the Sioux RSA.<sup>5</sup> In the second petition before us, NECC seeks reconsideration on the same grounds of the Bureau's dismissal of NECC's second application, a Phase II unserved area application filed in 2000.<sup>6</sup> Most recently, NECC has filed its third application, also under the cellular Phase II unserved area rules, as a "replacement" for its previously dismissed second application, and this third application remains pending before the Bureau.<sup>7</sup> Because of the overlapping issues involved in NECC's two reconsideration petitions and its latest unserved area application, we address all of these matters in this consolidated order.<sup>8</sup>

## III. DISCUSSION

4. We find that several portions of NECC's petitions do not meet the requirements for filing petitions for reconsideration because they rely on new facts not previously presented to the Commission, and

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<sup>1</sup> See 47 C.F.R. § 22.903(b) (1994); *see also* 47 C.F.R. § 22.911(b) (renumbered current rule on alternative CGSA determinations).

<sup>2</sup> See 47 C.F.R. § 22.911(a).

<sup>3</sup> See *generally id.* § 22.949 ("This section sets forth the process for licensing unserved areas in cellular markets for which the five year build-out has expired. This process has two phases: Phase I and Phase II.").

<sup>4</sup> See Sagir, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 8159 (2001) (*Sagir I MO&O*).

<sup>5</sup> In this first petition for reconsideration filed on May 3, 2001 ("May 3<sup>rd</sup> Petition"), NECC seeks to vacate the *Sagir I MO&O* until "basic qualification questions are resolved" in the Sagir renewal proceeding. NECC May 3<sup>rd</sup> Petition at 12, 14.

<sup>6</sup> See Sagir, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd. 7880 (Commercial Wireless Division 2001) (*Sagir II MO&O*). In this second petition for reconsideration filed on May 7, 2001 ("May 7<sup>th</sup> Petition"), NECC seeks the reinstatement of its Phase II application to pending status until "a meaningful review by the Commission" is conducted into the new "facts recently raised in the Sagir renewal proceeding." NECC May 7<sup>th</sup> Petition at 2; NECC June 6<sup>th</sup> Reply at 3.

<sup>7</sup> NECC filed this third unserved area application on September 21, 2001 for the same areas within the Sioux RSA as those filed for in its second unserved area application that was dismissed in the *Sagir II MO&O*.

<sup>8</sup> See, e.g., 47 C.F.R. § 1.106(a)(1) ("Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission.")

we therefore, dismiss these petitions in part. To the extent we consider these petitions on the merits, we deny NECC's arguments as either repetitive or unrelated and collateral to this proceeding. In addition, we dismiss NECC's latest Phase II unserved area application as defective under our rules.<sup>9</sup>

5. By dismissing or denying on the above grounds, we do not reach the substance of NECC's new allegations regarding Sagir's qualifications or compliance with Commission rules. Furthermore, we do not address any of the issues raised in NECC's separate challenge to the renewal of Sagir's cellular license for the Sioux RSA. These allegations and issues are not relevant to the resolution of the reconsideration petitions and application addressed by this order, and will be addressed in a separate proceeding.<sup>10</sup>

**A. Petition for Reconsideration of the *Sagir I MO&O***

6. Background. In the *Sagir I MO&O*, the Commission upheld the Bureau's dismissal of a petition filed by NECC seeking reconsideration of the Bureau's grant of Sagir's 1995 license modification. The Commission found that the Bureau properly dismissed NECC's reconsideration petition as procedurally defective under Section 1.106(b)(1) of the rules because NECC did not demonstrate good reason why it had not raised any objection to Sagir's modification application at the time it was filed.<sup>11</sup> The Commission did not find any basis in NECC's March 30<sup>th</sup> AFR upon which to exercise the discretion necessary to consider NECC's procedurally defective 1995 Petition.<sup>12</sup> Accordingly, the Commission upheld the Bureau's dismissal of NECC's Phase I application based on the fact that it conflicted with the CGSA of Sagir's

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<sup>9</sup> Because NECC's pending unserved area application is defective, we also dismiss as moot two separate Petitions to Dismiss or Deny File No. 0000599542, and all related responsive pleadings, filed by Sagir and WWC License L.L.C. (WWC) on October 26, 2001. See 47 C.F.R. § 1.939(g).

<sup>10</sup> NECC raises these allegations in its challenges to the renewal (and *pro forma* transfer of control) of Sagir's cellular license for the Sioux RSA. Sagir filed a renewal application for the Sioux RSA on August 31, 2000. NECC filed a competing application on September 29, 2000. Sagir filed its renewal expectancy showing on February 16, 2001. On March 19, 2001, NECC filed a petition to deny Sagir's renewal application in which it first alleged that there may have been an unauthorized transfer of the control of Sagir. On April 3, 2001, Sagir filed a notification of a *pro forma* transfer of control of its cellular license for the Sioux RSA. On April 17, 2001, NECC filed a petition for reconsideration of Sagir's notification in which NECC first asserts the allegations that it now argues constitute new facts in the instant proceeding upon which to reconsider the Commission's decision in the *Sagir I MO&O*.

<sup>11</sup> Sagir filed its major modification application to increase the size of its CGSA through the utilization of an alternative CGSA showing on November 19, 1994. On December 21, 1994, NECC filed its Phase I unserved area application for portions of the Sioux RSA that Sagir had previously applied to serve in its major modification application for an alternative CGSA. NECC did not file a petition to deny Sagir's application. On April 7, 1995, while NECC's Phase I application was pending, the Commission granted Sagir's earlier filed alternative CGSA application. NECC filed a petition for reconsideration on May 8, 1995 ("1995 Petition"). On February 29, 2000, the Bureau dismissed NECC's 1995 Petition because NECC did not demonstrate good reason for its failure to participate earlier in the proceeding as required by Section 1.106(b)(1) of the Commission's rules. See *Sagir, Inc., Order*, 15 FCC Rcd. 4466, 4468 ¶ 4 (Policy and Rules Branch 2000) (*Sagir I Order*); 47 C.F.R. § 1.106(b)(1). On March 30, 2000, NECC filed an application for review of the Bureau's decision ("March 30<sup>th</sup> AFR").

<sup>12</sup> See *Sagir I MO&O*, 16 FCC Rcd. at 8161-62 ¶¶ 3-4 (declining to exercise discretion to accept NECC's belated assertion of its interest in the Sagir modification application for an alternative CGSA and finding that the Bureau's dismissal of NECC's 1995 Petition for failure to meet the requirements of Section 1.106(b)(1) was proper). In addition to determining that NECC's allegation that there are "dead spots" within Sagir's alternative CGSA did not present the kind of serious injury to the public sufficient to outweigh considerations of administrative finality, the Commission observed that Section 22.911(b) of the Commission's rules provides that "service is considered to be provided in all areas, including 'dead spots'" of an alternative CGSA. *Id.* at 8161 ¶ 4 (quoting 47 C.F.R. § 22.911(b)).

modified license.<sup>13</sup>

7. In its May 3<sup>rd</sup> Petition, NECC urges the Commission to vacate the *Sagir I MO&O*, revoke the modified license grant, and reinstate NECC's Phase I application pending adjudication of alleged "recently uncovered facts" regarding Sagir's compliance with Commission rules and qualifications to be a Commission licensee that NECC has raised in its separate challenge to the renewal of Sagir's cellular license.<sup>14</sup> Specifically, NECC alleges that Sagir engaged in an unauthorized transfer of control of its license and then made misrepresentations and attempted to deceive the Commission regarding the transaction.<sup>15</sup> As a separate basis for its reconsideration petition, NECC also argues briefly that new data exists demonstrating that Sagir is not providing service to portions of its CGSA authorized by its modified license.<sup>16</sup>

8. Discussion. We dismiss NECC's May 3<sup>rd</sup> Petition in part and otherwise deny NECC the relief it seeks.<sup>17</sup> As discussed below, we find that NECC's claims provide no basis to postpone our review of prior actions on the instant applications and therefore deny the bulk of NECC's May 3<sup>rd</sup> Petition. We find that NECC's remaining claims based on an additional drive test on March 12, 2001 could have previously been presented and are therefore subject to dismissal for failure to comply with Section 1.106(b)(2)(ii) of the Commission's rules.<sup>18</sup>

9. We first address NECC's contention that its new factual allegations regarding an unauthorized transfer of Sagir's control provide a sufficient basis to reserve judgment at this time because success on the merits would warrant our exercising discretion to accept NECC's procedurally defective 1995 Petition.<sup>19</sup>

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<sup>13</sup> The Commission found that the Bureau properly determined that the area applied for by NECC was not available because the grant of Sagir's alternative CGSA application authorized Sagir to serve the area. See *Sagir I MO&O*, 16 FCC Rcd. at 8162-63 ¶ 6 ("The area that NECC proposed to serve in its Phase I application was unavailable within the meaning of Section 22.949 by virtue of the grant of Sagir's alternative CGSA modification application."). In the *Sagir I Order*, the Bureau had dismissed NECC's Phase I application as defective "because it seeks to provide service in an area that is presently not unserved." See *Sagir I Order*, 15 FCC Rcd. at 4468 ¶ 5 (finding that NECC's application failed to comply with Section 22.949 of the Commission's rules because its proposed CGSA was covered entirely by Sagir's authorized CGSA).

<sup>14</sup> NECC May 3<sup>rd</sup> Petition at 2; see *id.* at 12 ("[T]he Commission should vacate [the *Sagir I MO&O*] . . . in light of these allegations and should await the Commission's determinations regarding Sagir's transfer of control application and application for renewal prior to making a final determination [here]." NECC apparently believes that an "evidentiary hearing" into Sagir's qualifications and level of service in its modified CGSA could result in the reduction of Sagir's CGSA (via a revocation of the 1995 grant of Sagir's alternative CGSA application) such that the area in the Sioux RSA applied for by NECC becomes available under the unserved area licensing process and its Phase I application would be grantable. NECC June 6<sup>th</sup> Reply at 6.

<sup>15</sup> NECC May 3<sup>rd</sup> Petition at 2, 8, 13. Because our decisions here are tied significantly to our discretion as opposed to an evaluation or determination on the substance of NECC's claims, see *infra* note 30, we do not detail the variety of allegations that NECC has made against Sagir and which will be addressed in a separate proceeding.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> We uphold our prior determination in the *Sagir I MO&O*. See *Sagir I MO&O*, 16 FCC Rcd. at 8161-63 ¶¶ 4, 6. Thus, the Bureau's dismissal of NECC's 1995 Petition and its Phase I application for failure to meet the requirements of Sections 1.106(b)(1) and 22.949 of the rules stands.

<sup>18</sup> 47 C.F.R. § 1.106(b)(2)(ii). We note that the Bureau dismissed NECC's 1995 Petition on procedural grounds, and we did not make any determinations regarding the level of service provided by Sagir in the *Sagir I MO&O*. See *Sagir I MO&O*, 16 FCC Rcd. at 8162 ¶ 4 n.21. Because we are dismissing this portion of NECC's May 3<sup>rd</sup> Petition for procedural reasons, we do not address the substance of NECC's March 2001 drive test data and related service quality claims.

<sup>19</sup> In its May 3<sup>rd</sup> Petition, NECC's states: "It is premature for the Commission to enter a decision in favor of Sagir prior to the conclusion of the renewal proceeding . . . . Sagir's basic qualifications to hold a license are in jeopardy, (continued....)"

Although we agree with NECC that it could not have reasonably raised the facts regarding Sagir's transfer of control earlier in this proceeding,<sup>20</sup> we disagree that these facts could form a basis for changing our prior findings and conclusions in the *Sagir I MO&O*. Notwithstanding Sagir's claims that these are unsupported allegations based on inferences from publicly available documents,<sup>21</sup> we conclude that even if NECC's claims regarding Sagir's non-compliance were eventually to be found meritorious, the appropriate response would *not* be to exercise the discretion required to address the merits of NECC's 1995 Petition against the grant of Sagir's alternative CGSA application. The proper avenue for NECC's claims is to file a petition against Sagir's transfer notification, which NECC has already done,<sup>22</sup> with the potential that the transfer will be disallowed and, if appropriate, sanctions imposed. In addition, as NECC has already done,<sup>23</sup> these issues regarding Sagir's basic qualifications and compliance with Commission rules could form the basis for a petition against the renewal of Sagir's cellular license. NECC's allegations regarding Sagir's control, if true, would result in the appropriate Commission action(s), if any, in those contexts.<sup>24</sup>

10. We will not upset administrative finality here by considering the unrelated merits of the procedurally-defective 1995 Petition's contentions that Sagir's application for an alternative CGSA should not be granted.<sup>25</sup> In the *Sagir I MO&O*, we determined that NECC's allegations that there are "dead spots" within Sagir's alternative CGSA did not present the kind of serious injury to the public sufficient to outweigh considerations of administrative finality.<sup>26</sup> Although an unauthorized transfer of the sort alleged by NECC could constitute a more serious injury to the public,<sup>27</sup> in this particular case, it would not outweigh considerations of administrative finality given the nature of that injury and the fact that it is unrelated to NECC's underlying arguments against the validity of Sagir's alternative CGSA application. NECC's allegations regarding an unauthorized transfer of Sagir's control are simply not relevant and have no bearing on whether there is any injury to the public from Sagir's modified license such that we should consider the merits of NECC's procedurally-defective 1995 Petition. We find that there would be no benefit to awaiting a final disposition in the unrelated Sagir renewal proceeding before making our determination here on NECC's challenge to the *Sagir I MO&O*, as nothing in NECC's May 3<sup>rd</sup> Petition could lead us to reconsider our prior determination not to exercise our discretion and review NECC's procedurally-defective 1995 Petition.<sup>28</sup>

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and this application cannot be granted until these basic qualification questions are resolved." NECC May 3<sup>rd</sup> Petition at 13-14.

<sup>20</sup> We agree with NECC that it could not have raised the facts regarding Sagir's control earlier in this proceeding without exercising more than ordinary diligence, as Sagir did not file its notification of a *pro forma* transfer of control of its cellular license for the Sioux RSA until April 3, 2001. See *supra* note 10.

<sup>21</sup> Sagir filed an Opposition to Petition for Reconsideration on May 22, 2001 ("May 22<sup>nd</sup> Opposition").

<sup>22</sup> See *supra* note 10.

<sup>23</sup> *Id.*

<sup>24</sup> Finally, if these avenues for relief had not been available, NECC would have always been free to file a Section 1.41 informal request for Commission action. See 47 C.F.R. § 1.41.

<sup>25</sup> As we indicated above, see *supra* para. 9, even if Sagir's basic qualifications and compliance with the Commission's transfer rules are of the sort alleged by NECC, the proper remedy would not be to permit NECC to contest Sagir's right to serve its CGSA as modified by the grant of its alternative CGSA showing.

<sup>26</sup> In the *Sagir I MO&O*, we held that NECC failed to meet the standard set forth in Section 1.106(b)(1). See *Sagir I MO&O*, 16 FCC Rcd. at 8161 ¶ 3. In addition, we found no basis to exercise our discretion and consider the substance of NECC's 1995 Petition. *Id.* at 8161-62 ¶ 4 (acknowledging that "Commission precedent reveals decisions on both sides of this issue").

<sup>27</sup> For example, NECC alleges that it has discovered "a pattern of violation of the Commission's rules on transfers of control by Sagir which Sagir has apparently been concealing for over six years." NECC May 3<sup>rd</sup> Petition at 2.

<sup>28</sup> See *Sagir I MO&O*, 16 FCC Rcd. at 8161-62 ¶ 4.

11. Furthermore, we find that these allegations contained in NECC's May 3<sup>rd</sup> Petition amount to nothing more than an improper collateral attack on the Commission's grant of Sagir's transfer notification. We agree with Sagir that such a line of argument is not appropriately raised in a proceeding to determine whether the 1995 grant of Sagir's modified CGSA (and the concomitant dismissal of NECC's Phase I unserved area application) will inevitably be upheld.<sup>29</sup> Much if not all of NECC's argument in its May 3<sup>rd</sup> Petition repeats its petition against the grant of Sagir's transfer notification and its pleadings in the unrelated Sagir renewal proceeding. Accordingly, we will not consider here matters relating to those proceedings.<sup>30</sup> As explained above, NECC has already availed itself of the proper procedures by filing petitions against Sagir's transfer notification and license renewal.<sup>31</sup>

12. We next address NECC's claim that new data from an additional drive test in March 2001 documents Sagir's failure to serve portions of its modified CGSA, and, we find that this argument does not meet the threshold requirements of Section 1.106(b)(2)(ii) of the Commission's rules for petitions for reconsideration.<sup>32</sup> We do not believe that this argument relies on new facts that could not have been learned through the exercise of ordinary diligence prior to its March 30<sup>th</sup> AFR. NECC's pleadings are silent on this issue and do not demonstrate any inability to reasonably obtain and submit this drive test data prior to March 30, 2000.<sup>33</sup> NECC makes no attempt to explain how actions taken or not taken by Sagir, the lack of publicly available information, or any other factor demonstrates that only extraordinary diligence could have revealed this new drive test data before NECC's last opportunity to present such matters in its March 30<sup>th</sup> AFR. Accordingly, we dismiss this portion of NECC's petition for lack of compliance with our rules.<sup>34</sup>

#### **B. Petition for Reconsideration of Dismissed Phase II Unserved Area Application**

13. Background. On April 6, 2001, the Bureau dismissed NECC's Phase II application as defective because the service area boundary (SAB) of each proposed cell site impermissibly extended into the CGSA authorized to be served by Sagir, regardless of the extent of service being provided by Sagir within the portions of its CGSA authorized by grant of the alternative CGSA modification.<sup>35</sup> The Bureau stated that nothing in the record would make it appropriate to reconsider the grant of Sagir's modified CGSA in a

<sup>29</sup> See, e.g., Sagir May 22<sup>nd</sup> Opposition at i, 2.

<sup>30</sup> Although we decline to exercise our discretion to afford NECC the relief it requests, we emphasize that we do not make any determinations regarding these issues as raised by NECC in these other proceedings. We only determine that NECC's allegations in this regard, regardless of merit, would be of no consequence to any decision whether to reconsider the grant of Sagir's modified CGSA and dismissal of NECC's Phase I application.

<sup>31</sup> See *supra* para. 9.

<sup>32</sup> See 47 C.F.R. § 1.106(b)(2)(ii).

<sup>33</sup> Although NECC's pleadings generally claim that these tests are new facts that only recently came to light in the context of the Sagir license renewal proceeding, NECC May 3<sup>rd</sup> Petition at 2, NECC June 6<sup>th</sup> Reply at 2, its pleadings are limited to explaining that "NECC could not have raised these facts [*regarding Sagir's control*] earlier because they were not publicly available or had not been confirmed by Sagir," NECC June 6<sup>th</sup> Reply at 2.

<sup>34</sup> Although NECC's pleadings again claim these new drive test data evidence "dead spots" in Sagir's alternative CGSA, see, e.g., NECC June 6<sup>th</sup> Reply at 6, we previously noted that "Section 22.911(b) of the Commission's rules provides that 'service is considered to be provided in all areas, including 'dead spots' of an alternative CGSA,'" *Sagir I MO&O*, 16 FCC Rcd. at 8161 ¶ 4 (quoting 47 C.F.R. § 22.911(b)). See *supra* note 12. Dead spots are defined as "[s]mall areas within a service area where the field strength is lower than the minimum level for reliable service." 47 C.F.R. § 22.99.

<sup>35</sup> On February 29, 2000, NECC filed its Phase II unserved area application seeking *inter alia* authority for areas within the Sioux RSA. On April 6, 2001, the Bureau dismissed the application as defective under Section 22.912(a) of the Commission's rules. See *Sagir II MO&O*, 16 FCC Rcd. at 7881-82 ¶ 5. The Bureau noted Section 22.911(b) of the Commission's rules to explain that for the licensing of alternative CGSAs, service is considered to be provided in all areas of an alternative CGSA, including dead spots. See *id.* at 7881 ¶ 5.

proceeding regarding whether NECC's Phase II application met the Commission's rules for unserved area licensing.<sup>36</sup>

14. In its May 7<sup>th</sup> Petition, NECC alleges that the same facts raised in its May 3<sup>rd</sup> Petition (*i.e.*, the "facts recently raised in the Sagir renewal proceeding . . . [regarding] Sagir's basic qualifications to hold a license" and new drive test data)<sup>37</sup> provide a basis to reconsider the Bureau's decision in the *Sagir II MO&O* and return its dismissed Phase II application to pending status.<sup>38</sup> NECC alleges that consideration of these new facts is required in the public interest pursuant to Section 1.106(c)(2) of the Commission's rules.<sup>39</sup> In addition, NECC seeks reconsideration of its Phase II application's dismissal by stating that "NECC has opposed Sagir's alternative CGSA since it was applied for in November, 1994."<sup>40</sup> On the basis of its previously submitted data from a drive test in March 2000,<sup>41</sup> as well as its repeated arguments that "gaps in Sagir's coverage. . . are more than . . . 'dead spots'" and represent unserved area in the Sioux RSA which its Phase II application purports to serve,<sup>42</sup> NECC insists that the Bureau erred when it concluded it was not appropriate to revisit the grant of Sagir's modified CGSA.<sup>43</sup>

15. Discussion. We dismiss NECC's May 7<sup>th</sup> Petition in part and otherwise deny NECC the relief it seeks. We find that NECC's petition is deficient both procedurally and substantively. There would be no benefit to the public interest under Section 1.106(c)(2) by considering NECC's claims based on alleged new facts against Sagir when the only relevant issue in this particular matter is whether NECC's Phase II application was properly dismissed as defective under Commission rules.<sup>44</sup> Furthermore, NECC's remaining arguments were not only considered and clearly disposed of by the Bureau in the *Sagir II MO&O*, but we rejected substantially similar arguments in the earlier *Sagir I MO&O*. For these reasons, we uphold the Bureau's dismissal of NECC's Phase II application under Section 22.912(a) of the Commission's rules.<sup>45</sup>

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<sup>36</sup> To the extent that NECC sought to "shrink [Sagir's] CGSA" by reconsideration of the grant of Sagir's modified CGSA, *id.* at 7881 ¶ 3, the Bureau stated that nothing in the record of the proceeding, including claims based on drive test data and allegations of purported "dead spots" in Sagir's modified CGSA, warranted revisiting the grant of Sagir's alternative CGSA previously upheld by the Commission in the *Sagir I MO&O*, *id.* at 7881-82 ¶¶ 4-5.

<sup>37</sup> NECC May 7<sup>th</sup> Petition at 2, 4.

<sup>38</sup> *Id.* at 2, 5. As discussed above, *see supra* para. 7, these additional facts relate to alleged "violations of the FCC's rules on transfers of control by Sagir" and "drive test results [that] demonstrate that [Sagir's] alternative CGSA bears no resemblance to Sagir's actual coverage," NECC May 7<sup>th</sup> Petition at 3, 4. In addition to these alleged new facts regarding Sagir's coverage and compliance with Commission rules, NECC also presents its argument against the Bureau's basis for its conclusion that it would not be appropriate to revisit the grant of Sagir's modified CGSA. NECC May 7<sup>th</sup> Petition at 1-2.

<sup>39</sup> NECC May 7<sup>th</sup> Petition at 2; *see* 47 C.F.R. § 1.106(c)(2).

<sup>40</sup> NECC May 7<sup>th</sup> Petition at 1. We note that NECC did not formally oppose Sagir's alternative CGSA application until it filed its 1995 Petition in May of 1995.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1-2. Sagir filed an Opposition to Petition for Reconsideration on May 22, 2001 ("Second May 22<sup>nd</sup> Opposition").

<sup>44</sup> We note that this presentation is also defective under the requirements of Section 1.106(c)(1), 47 C.F.R. § 1.106(c)(1), as any new drive test data could have previously been presented with ordinary diligence, *see supra* para. 12. To the extent the alleged new facts regarding Sagir's transfer of control could not have been raised earlier in this proceeding, we deny NECC the relief it requests for the same reasons explained above. *See supra* paras. 9-11.

<sup>45</sup> *See Sagir II MO&O*, 16 FCC Rcd. at 7881-82 ¶ 5.

16. We dismiss the portion of NECC's May 7<sup>th</sup> Petition that relies on new facts not previously presented in this proceeding,<sup>46</sup> because it fails to meet the requirements of our rules governing petitions for reconsideration.<sup>47</sup> NECC fails to justify why the public interest requires a consideration of these facts in the context of a proceeding to determine whether an application filed by NECC is defective.<sup>48</sup> Even if, as NECC generally alleges, "the public interest demands" a review of "Sagir's basic qualifications to hold a license,"<sup>49</sup> a review of such facts is not required in order to make our determination in the instant case. In addition, we note that drive test data about Sagir's quality of service is not relevant to NECC's proposed CGSA in its Phase II application. We agree with statements made by Sagir that "the instant proceeding relates solely to whether NECC's application is defective."<sup>50</sup> NECC has already presented its alleged new facts at multiple occasions, including in its outstanding petitions against Sagir's transfer notification and license renewal,<sup>51</sup> as well as in its May 3<sup>rd</sup> Petition against the *Sagir I MO&O*.<sup>52</sup> The Bureau explained that it would not be appropriate to revisit the grant of Sagir's alternative CGSA application in the context of NECC's Phase II application,<sup>53</sup> and we agree. Because we find that NECC's claims based on new allegations against Sagir cannot cure the shortcomings in its Phase II unserved area application,<sup>54</sup> we conclude that it is not required in the public interest to consider these portions of NECC's May 7<sup>th</sup> Petition.<sup>55</sup>

17. We deny the claims in the remaining portions of NECC's May 7<sup>th</sup> Petition.<sup>56</sup> NECC's May 7<sup>th</sup> Petition repeats arguments that areas within Sagir's alternative CGSA are without reliable coverage and that these areas represent unserved areas and not dead spots.<sup>57</sup> As the Bureau explained in the *Sagir II MO&O*, such issues are irrelevant for purposes of determining the CGSA authorized to Sagir and within which NECC was not permitted to propose SAB extensions from its cell sites in its Phase II application.<sup>58</sup> We note that prior to filing these portions of its May 7<sup>th</sup> Petition, we had denied the same arguments in the context of Sagir's Phase I unserved area application. In the *Sagir I MO&O*, we specifically denied NECC's challenge to the propriety of Sagir's alternative CGSA and explained that the cellular rules considered service to be provided in all areas, including dead spots, of an alternative CGSA.<sup>59</sup> We therefore find NECC's arguments

<sup>46</sup> See NECC May 7<sup>th</sup> Petition at 2-5.

<sup>47</sup> See 47 C.F.R. § 1.106(c)(2); see also *supra* note 44.

<sup>48</sup> See *supra* para. 15.

<sup>49</sup> NECC May 7<sup>th</sup> Petition at 2, 3.

<sup>50</sup> Sagir Second May 22<sup>nd</sup> Opposition at 7.

<sup>51</sup> See *supra* para. 9.

<sup>52</sup> See *supra* para. 7.

<sup>53</sup> See *Sagir II MO&O*, 16 FCC Rcd. at 7881 ¶ 4.

<sup>54</sup> See Sagir Second May 22<sup>nd</sup> Opposition at 7 ("NECC cannot cure the defects in its Phase II unserved area application.").

<sup>55</sup> Because we are dismissing this portion of NECC's petition for procedural reasons, we do not evaluate NECC's claims regarding Sagir's level of service, qualifications, or compliance with Commission rules.

<sup>56</sup> See NECC May 7<sup>th</sup> Petition at 1-2.

<sup>57</sup> In addition, NECC's arguments regarding Sagir's fill-in applications are repetitive given the Bureau's detailed explanation and discussion in the *Sagir II MO&O*. See *Sagir II MO&O*, 16 FCC Rcd. at 7881-82 ¶¶ 4-5.

<sup>58</sup> *Id.*

<sup>59</sup> See *Sagir I MO&O*, 16 FCC Rcd. at 8161-62 ¶ 4. Although we find these arguments repetitive and deny them on the merits for the reasons previously stated by the Bureau, we note that further administrative filings and/or proceedings attempting to call into question the validity of Sagir's 1995 alternative CGSA grant could be deemed frivolous under Section 1.52 of the rules given our rejection of these arguments both here and in the *Sagir I MO&O*. See 47 C.F.R. § 1.52; see also Commission Taking Tough Measures against Frivolous Pleadings, *Public Notice*, 11 FCC Rcd 3030 (1996). The Commission first, and Division second, left no doubt that such arguments had been

(continued....)



here entirely repetitive and without merit.<sup>60</sup>

### C. Pending “Replacement” Phase II Unserved Area Application

18. Background. On September 21, 2001, NECC filed its “Replacement” Phase II application for the same areas within the Sioux RSA as those filed for in its Phase II application that was dismissed in the *Sagir II MO&O*.<sup>61</sup> NECC claims that it filed its application as a “means of restoring an improperly deleted application to the Commission’s licensing database.”<sup>62</sup>

19. Discussion. We dismiss NECC’s “Replacement” Phase II application as defective under Commission rules.<sup>63</sup> Our dismissal follows directly from NECC’s admission that its “Replacement” Phase II application is identical to its previously dismissed Phase II unserved area application.<sup>64</sup> To the extent that NECC attempts to characterize this application as a corrective filing “to restore its prior application to active status where there has not been a final decision on the merits,”<sup>65</sup> we find this explanation to be without merit as no provision in the Commission’s rules permits applicants to return such dismissed applications to pending status by filing a “replacement” application.<sup>66</sup> Furthermore, contrary to NECC’s assertions, the Commission did not purge or delete NECC’s previously dismissed Phase II unserved area application from the Universal Licensing System (ULS).<sup>67</sup> Moreover, our rules clearly state that the filing of a petition for reconsideration does not stay or postpone the effectiveness of the dismissal of NECC’s Phase II application.<sup>68</sup> For these reasons, we find that NECC’s “replacement” submission is defective.<sup>69</sup>

## IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications

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specifically rejected, and given our decision here, there may no longer be any “good ground to support” a subsequent pleading or action that relies on these previously dismissed claims in substantially similar circumstances. *Id.*

<sup>60</sup> By this decision, we are not making any determinations regarding the level or quality of service provided by Sagir.

<sup>61</sup> On October 26, 2001, Sagir and WWC filed separate Petitions to Dismiss or Deny. NECC filed an Opposition to Petitions to Dismiss or Deny on November 19, 2001 (“November 19<sup>th</sup> Opposition”).

<sup>62</sup> NECC November 19<sup>th</sup> Opposition at 4.

<sup>63</sup> 47 C.F.R. § 1.937(c); § 1.934(d)(2); § 22.912(a); *see also* supra note 9 (dismissing as moot petitions filed by Sagir and WWC).

<sup>64</sup> *See* NECC November 19<sup>th</sup> Opposition at 5.

<sup>65</sup> *Id.*

<sup>66</sup> NECC does not reference any Commission rule or direction from Commission staff that would support its motivations to take such action.

<sup>67</sup> File No. 0000086223 still exists in ULS along with NECC’s May 7<sup>th</sup> Petition.

<sup>68</sup> *See* 47 C.F.R. § 1.102(b).

<sup>69</sup> Although we dismiss NECC’s “replacement” application as defective for the reasons stated, we remind NECC of our authority to dismiss with prejudice future applications that repeat recently acted upon matters, do not constitute an efficient use of Commission resources, and needlessly divert attention from other important matters needing resolution. Moreover, despite NECC’s assertion that “[n]othing forbids the filing of an application if it merely is submitted to ensure that the application subject to appeal remains on file,” NECC November 19<sup>th</sup> Opposition at 5, we note that further attempts to reinstate a dismissed application to a pending status by resubmitting the same application could be considered a misuse of the Commission’s licensing process.

Act, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by N.E. Colorado Cellular, Inc. on May 3, 2001 in the above-captioned matter is DISMISSED as indicated to the extent above, and otherwise DENIED.

21. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by N.E. Colorado Cellular, Inc. on May 7, 2001 in the above-captioned matter is DISMISSED as indicated to the extent above, and otherwise DENIED.

22. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(d), and Sections 1.934(d)(2), 1.937(c), 1.939, 22.912(a) and 22.949(b) of the Commission's rules, 47 C.F.R. §§ 1.934(d)(2), 1.937(c), 1.939 and 22.912(a) and 22.949(b), the above-captioned Phase II unserved area application filed by N.E. Colorado Cellular, Inc. on September 21, 2001 is DISMISSED as defective.

23. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(d), and Sections 1.934(d)(2), 1.937(c), 1.939, 22.912(a) and 22.949(b) of the Commission's rules, 47 C.F.R. §§ 1.934(d)(2), 1.937(c), 1.939, 22.912(a), and 22.949(b), the Petition to Dismiss or Deny filed by Sagir, Inc. on October 26, 2001 in the above-captioned matter is DISMISSED as moot.

24. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(d), and Sections 1.934(d)(2), 1.937(c), 1.939, 22.912(a) and 22.949(b) of the Commission's rules, 47 C.F.R. §§ 1.934(d)(2), 1.937(c), 1.939, 22.912(a), and 22.949(b), the Petition to Dismiss or Deny filed by WWC License L.L.C. on October 26, 2001 in the above-captioned matter is DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary