

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

In the Matter of)
)
Amendment of Parts 1 and 22 of the Commission's) WT Docket No. 12-40 (terminated)
Rules with Regard to the Cellular Service,)
Including Changes in Licensing of Unserved Area) RM No. 11510 (terminated)
)
Amendment of the Commission's Rules with)
Regard to Relocation of Part 24 to Part 27)
)
Interim Restrictions and Procedures for Cellular)
Service Applications)
)
Amendment of Parts 0, 1, and 22 of the)
Commission's Rules with Regard to Frequency)
Coordination for the Cellular Service)
)
Amendment of Part 22 of the Commission's Rules)
Regarding Certain Administrative and Filing)
Requirements)
)
Amendment of the Commission's Rules Governing) RM No. 11660 (terminated)
Radiated Power Limits for the Cellular Service)
)
Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95,) WT Docket No. 10-112
and 101 to Establish Uniform License Renewal,)
Discontinuance of Operation, and Geographic)
Partitioning and Spectrum Disaggregation Rules)
and Policies for Certain Wireless Radio Services)
)
2016 Biennial Review of Telecommunications) WT Docket No. 16-138
Regulations)

ORDER ON RECONSIDERATION

Adopted: March 20, 2019

Released: March 22, 2019

By the Commission:

I. INTRODUCTION

1. On July 13, 2018, the Commission deleted a rule regarding Equal Employment Opportunity (EEO) requirements for Part 22 licensees (Section 22.321), reasoning that the rule was subsumed by another applying such requirements to all Commercial Mobile Radio Service (CMRS) licensees (Section 90.168).¹ The Critical Messaging Association (CMA), which supported that deletion,

¹ Amendment of Parts 1 and 22 of the Commission's Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area, Amendment of the Commission's Rules with Regard to Relocation of Part 24 to Part 27; Interim Restrictions and Procedures for Cellular Service Applications; Amendment of Parts 0, 1, and 22 of the Commission's Rules with Regard to Frequency Coordination for the Cellular Service; Amendment of the

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has filed a petition for reconsideration.² CMA does not seek reconsideration of any rule change implemented in the *Third Report and Order*. Rather, it asks the Commission to reconsider that Order's "interpretation of Section 90.168." CMA argues that the Commission erred in construing Section 90.168 to apply to CMRS providers that are not licensed under Part 90. Accordingly, CMA contends that with the deletion of Section 22.321's annual EEO reporting requirement, CMRS providers licensed under Part 22 are subject only to the annual EEO reporting obligations found in Section 1.815, which do not apply to providers, such as some of its members, with fewer than 16 employees. We deny the CMA Petition.

II. BACKGROUND

2. Throughout this proceeding, the Commission has taken significant steps to modernize and streamline its licensing and technical rules for licensees in the 800 MHz Cellular Radiotelephone (Cellular) Service. The Commission's 2014 Report and Order³ and 2017 Second Report and Order⁴ adopted numerous rule amendments and deletions to eliminate unnecessary filings and other regulatory burdens for Cellular licensees. The *Second Report and Order* also revised the Cellular technical rules to facilitate the use of Cellular spectrum to provide advanced mobile broadband services, such as 4G long term evolution (LTE), while protecting 800 MHz public safety communications from increased potential for unacceptable interference.⁵ The Commission's actions have resulted in Cellular Service rules more akin to the flexible licensing schemes found in other similar mobile services, such as the Broadband Personal Communications Service (PCS),⁶ the commercial service in the 700 MHz band (700 MHz Service),⁷ the 600 MHz Service,⁸ and the Advanced Wireless Services (AWS).⁹

3. In the *Second Further Notice*, the Commission, in an effort to build on reforms adopted in the *Report and Order* and *Second Report and Order* and to respond to certain submissions by commenters in the Commission's 2016 Biennial Review of Telecommunications Regulations proceeding (WT Biennial Review proceeding),¹⁰ proposed and sought comment on additional reforms of its Part 22

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Commission's Rules Governing Radiated Power Limits for the Cellular Service; Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services; 2016 Biennial Review of Telecommunications Regulations, WT Docket Nos. 12-40, 10-112, and 16-138, RM Nos. 11510 and 11660, Third Report and Order, 33 FCC Rcd 7017, 7023-24 (2018) (*Third Report and Order*) (deleting 47 CFR § 22.321 ("Equal employment opportunities")).

² Critical Messaging Association Petition for Reconsideration, WT Docket No. 12-40 (filed Sept. 4, 2018) (CMA Petition).

³ See *Amendment of Parts 1 and 22 of the Commission's Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area* (other captions omitted), WT Docket No. 12-40, RM Nos. 11510 and 11660, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 14100 (2014) (*Report and Order*).

⁴ *Amendment of Parts 1 and 22 of the Commission's Rules with Regard to the Cellular Service, Including Changes in Licensing of Unserved Area*; (other captions omitted); *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 to Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services; 2016 Biennial Review of Telecommunications Regulations*, WT Docket Nos. 12-40, 10-112, and 16-138, RM Nos. 11510 and 11660, Second Report and Order, Report and Order, and Second Further Notice of Proposed Rulemaking, 32 FCC Rcd 2518 (2017). In this Order, we reference the Second Report and Order and the Report and Order collectively as "*Second Report and Order*"; we reference the Second Further Notice of Proposed Rulemaking as "*Second Further Notice*."

⁵ *Second Report and Order*, 32 FCC Rcd at 2535-57, 2562-64.

⁶ See generally 47 CFR §§ 24.1 *et seq.*

rules governing not only the Cellular Service but other Part 22 Public Mobile Services (PMS) as well.¹¹ The *Second Further Notice* sought comment on deletion of certain record-keeping requirements that were decades old and on rules that appeared duplicative of obligations set forth elsewhere in the Commission's rules.

4. Among the queries, the *Second Further Notice* sought comment on whether to retain Section 22.321(c), in light of comments in the WT Biennial Review proceeding that argued that Section 22.321(c) should be repealed in light of EEO provisions in Section 1.815 of the Commission's rules.¹² At the time of the *Second Further Notice*, Section 22.321(c) required all Part 22 licensees (i.e., PMS licensees), regardless of how many employees they had, to submit an annual report to the Commission indicating whether any EEO complaints had been filed at the federal, state, or local level against the licensee. For any such complaint, the report was required to state the parties involved, date of filing, the court or agencies reviewing the complaint, appropriate file number, and disposition of the complaint.¹³ In comparison, common carriers with at least 16 full-time employees were (and still are) subject to the same complaints reporting requirement under Section 1.815.¹⁴ In response to the *Second Further Notice*, several commenters, including CMA, argued that Section 22.321(c) was ripe for deletion.¹⁵ CMA also asserted that, if the Commission were to delete Section 22.321(c), then common carrier licensees and permittees with fewer than 16 full-time employees would no longer be subject to an EEO complaints report filing requirement at the Commission, given the fact that Section 1.815 applies only to common carriers with at least 16 full-time employees.¹⁶

5. In the *Third Report and Order*, the Commission deleted several administrative and recordkeeping rules for Part 22 licensees, eliminating outdated burdens that were inconsistent with the Commission's practices and the current predominant use of electronic records storage and access.¹⁷ The Commission also deleted the entirety of Section 22.321 (not just the complaints reporting requirement of subsection (c)), based on its conclusion that Section 22.321 was duplicative of EEO requirements

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⁷ See generally 47 CFR Part 27.

⁸ See generally *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014) (*BIA Report and Order*) (subsequent history omitted); 47 CFR § 27.5(l).

⁹ See generally 47 CFR Part 27.

¹⁰ The Commission had solicited comments in a public notice in its WT Biennial Review proceeding. *Commission Seeks Public Comment in 2016 Biennial Review of Telecommunications Regulations*, WT Docket No. 16-138 (other docket numbers omitted), Public Notice, 31 FCC Rcd 12166, 12174-75 (2016) (*Biennial Review Public Notice*). (We note that, although the Commission considered in this Cellular Reform proceeding certain issues that were initially raised by commenters in response to the *Biennial Review Public Notice* in the WT Biennial Review proceeding, such consideration does not otherwise impact review of other comments and issues raised in response to that *Public Notice*.)

¹¹ *Second Further Notice*, 32 FCC Rcd at 2570-75. The other services governed by Part 22 of our rules are Paging, Air-Ground, Rural, and Offshore Radiotelephone.

¹² *Id.* at 2573 (citing Verizon Biennial Review Comments).

¹³ 47 CFR § 22.321(c).

¹⁴ 47 CFR § 1.815 (specifying that an annual employment report is to be submitted on FCC Form 395).

¹⁵ *Third Report and Order*, 33 FCC Rcd at 7023-24 (discussing comments submitted by AT&T, CMA, EWA, and Verizon).

¹⁶ *Id.* (citing CMA Comments at 3). The Enterprise Wireless Alliance (EWA) argued that Section 22.321 was unnecessary in its entirety, and Verizon argued that Section 1.815 should be deleted. *Id.* nn.44 and 46 (citing EWA

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applicable to “Commercial Mobile Radio Services licensees” in Section 90.168 and no longer necessary.¹⁸ In making this decision, the Commission noted that *all* CMRS licensees are subject to Section 90.168, thus effectively rejecting CMA’s assertion that deleting Section 22.321 would remove EEO obligations for CMRS providers with fewer than 16 employees.¹⁹

6. In response, CMA filed a petition for reconsideration on September 4, 2018. As noted above, CMA does not ask the Commission to change any rules, but simply contends that the Commission erred in concluding that Section 90.168 applies to all CMRS and subsumes former Section 22.321.²⁰ According to CMA, Section 90.168 applies solely to those CMRS licensed under Part 90, which, according to CMA, consist only of CMRS licensees operating in the Industrial/Business Radio Pool. CMA argues that Section 90.168(c), when read together with Section 90.1(b), subjects each CMRS licensee in the Industrial/Business Radio Pool to the annual EEO complaints reporting requirement, regardless of how many employees it has, but that other CMRS licensees are not covered by Section 90.168(c) or other provisions of Section 90.168.²¹ CMA supplemented its Petition with an *ex parte* filing in which it notes that, when the Commission adopted Section 90.168 along with numerous other provisions in 1994 in the CMRS rulemaking proceeding, it was carrying out a directive to implement the Omnibus Budget Reconciliation Act of 1993 (OBRA).²² Citing that proceeding’s *CMRS Second Report and Order*, CMA argues that “Section 90.168 and its companions were adopted and applied to Part 90 CMRS licensees (and only Part 90 CMRS licensees) in order to bring them up to the same standards already and historically applied to Part 22 CMRS licensees.”²³

7. No other party filed a petition for reconsideration of the *Third Report and Order*, and no one filed comments on the CMA Petition.

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Ex Parte Letter at 3-4, Verizon Comments at 4-5). The Commission found that Verizon’s request was beyond the scope of the proceeding and declined to consider it. *Id.* n.46. The Commission, finding that the Part 90 rules were also beyond the scope of the proceeding, did not propose to remove the complaints reporting requirement or any other EEO provision in Section 90.168, nor did any commenter suggest doing so. *See id.* at 7024 (adding, at n.47, that neither CMA nor EWA had adequately demonstrated why licensees with fewer than 16 employees should be exempt from this requirement, and declining to eliminate the complaints reporting requirement in Section 90.168(c)).

¹⁷ *Id.* at 7020-25.

¹⁸ *Id.* at 7023-24. Thus, the Commission not only eliminated the duplication of the annual EEO complaints reporting requirements, but also the duplication of a number of other EEO provisions.

¹⁹ *Id.* at 7024.

²⁰ CMA Petition at 1-2.

²¹ *Id.* at 2 (citing the language in Section 90.1(b) that states: “This part states the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services.”)

²² Letter from Kenneth E. Hardman, Counsel for CMA, to Marlene H. Dortch, Secretary, FCC, Attachment at 2 (filed Sept. 11, 2018) (Hardman *Ex Parte* Letter) (citing Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI § 6002(b), 107 Stat. 312, 393-396 (1993)).

²³ Hardman *Ex Parte* Letter at 1. Specifically, CMA cites the background section of the 1994 *CMRS Second Report and Order*, which provides that “the first principal objective of the 1993 OBRA amendments was to adopt ‘a new approach to the classification of mobile services to ensure that similar services would be subject to consistent regulatory classification,’” recognizing that OBRA mandated that both “Part 90 for-hire radio systems and Part 22 common carrier radio systems . . . [would be] treated as common carrier systems, subject to comparable regulations.” *Id.* at 1, Attachment at 2-3 (citation omitted).

III. DISCUSSION

8. We deny the CMA Petition as fundamentally misreading the purpose of the Commission's EEO rules and the Commission's intent in the *Third Report and Order*. The Commission has long recognized the importance of having EEO rules that apply to common carriers, including all CMRS providers. The Commission purposely applied its EEO program and policy requirements broadly in 1970, and in that context, it also adopted the complaints reporting requirement for common carriers no matter their size.²⁴ As the Commission stated at the time, "discriminatory employment practices by a common carrier are incompatible with its operation in the public interest." It further stated that, in its determinations under the Communications Act of 1934, as amended, the Commission must "take into account allegations raising substantial questions whether the [entity] has violated, or is in violation of, the Civil Rights Act or a pertinent State law in this field."²⁵ The Commission subsequently reviewed the application of EEO requirements to all CMRS in the CMRS proceeding, a proceeding in which, as CMA alludes, the Commission sought to adopt rules to establish regulatory symmetry among similar CMRS pursuant to congressional mandate.²⁶ In the *CMRS Third Report and Order*, the Commission stated its purpose was to ensure application of the EEO rules "to all CMRS providers."²⁷ In adopting Section 90.168, the Commission discussed at length the record evidence and concluded that it is "appropriate and necessary" to do so in order "to achieve the statutory goal of increased ownership opportunities for minorities and women in spectrum-based services."²⁸

9. Against this background, the Commission deleted Section 22.321 in the *Third Report and Order*, reasoning that Section 90.168 applies to all CMRS, including Part 22 licensees, and thus subsumes Section 22.321.²⁹ The Commission noted that Section 90.168, with the same title and virtually identical provisions as Section 22.321, imposes the same obligations on CMRS licensees as those in Section 22.321, including the requirement, found in Section 22.321(c), to file a complaints report annually regardless of the licensee's size. Concluding that Part 22 licensees were subject to the same EEO obligations under both rules, and with the intent of removing repetitive rules, the Commission deleted Section 22.321 in its entirety.³⁰ The *Third Report and Order* was clear that the Commission intended only to delete a duplicative rule and not to change the substantive requirements applicable to CMRS licensees.

10. We disagree with CMA's narrow interpretation of the applicability of Section 90.168. Section 90.168 begins by requiring that "Commercial Mobile Radio Service licensees"—not a subset of

²⁴ *Rulemaking to Require Communications Common Carriers to Show Nondiscrimination in Their Employment Practices*, Docket No. 18742, Report and Order, 24 F.C.C.2d 725 (1970).

²⁵ *See id.* at 726, 728 (adopting the specific requirement that even entities with fewer than 16 employees must submit a report on complaints of violations of EEO provisions of federal, state, Territorial, or local law).

²⁶ *See e.g. Implementation of Sections 3(N) and 332 of the Communications Act – Regulatory Treatment of Mobile Services; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, GN Docket No. 93-252, PR Docket Nos. 93-144 and 94-212, Third Report and Order, 9 FCC Rcd 7988 (1994) (*CMRS Third Report and Order*). *See also generally Implementation of Sections 3(N) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, et al.*, GN Docket No. 93-252 (other docket nos. omitted), Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 6341 (2000).

²⁷ *CMRS Third Report and Order*, 9 FCC Rcd at 8096.

²⁸ *Id.* at 8096-99.

²⁹ *Third Report and Order*, 33 FCC Rcd at 7023-24.

³⁰ *Id.* at 7024.

CMRS licensees—afford equal opportunity in employment and not discriminate in employment, and then requires in Section 90.168(c) that “[e]ach licensee, regardless of how many employees it has, shall submit an annual report to the Commission” indicating whether any EEO complaints have been filed against it.³¹ Contrast that with Section 1.815 of our rules, which limits the scope of EEO filings to “common carrier licensee[s] or permittee[s] with 16 or more full time employees.”³² The absence of any such delimiter in Section 90.168(c) makes clear that the Commission did not intend to limit such EEO obligations only to CMRS licensees with 16 or more full time employees. And indeed, the Order adopting Section 90.168 makes clear that the Commission intended that rule to apply to all CMRS licensees, not just to a subset.³³ For similar reasons, we reject CMA’s argument that the clear text of Section 90.168 should be set aside because the Commission originally created Part 90 for another purpose.³⁴ Nothing in that purpose clause (adopted long before Section 90.168) claims to limit the scope of Part 90 for commercial licensees. And even if it did, we read the specific language in Section 90.168 (applying EEO requirements to all CMRS licensees) as governing rather than the general language of the purpose clause.

11. Finally, we note that it was not the Commission’s intent in the *Third Report and Order* to relieve any licensee of its EEO obligations under our rules, including the annual complaints reporting requirement, regardless of a licensee’s number of employees. Likewise, it was not the Commission’s intent that Part 22 licensees only be subject to the Commission’s EEO provisions found in Section 1.815. We therefore reiterate that all CMRS licensees are subject to Section 90.168, including the requirement that CMRS licensees, regardless of size, file EEO complaint reports.

IV. PROCEDURAL MATTERS

12. *Paperwork Reduction Act Analysis.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.³⁵

13. *Congressional Review Act.* The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act.³⁶

14. *Regulatory Flexibility Act.* As noted, while the *Third Report and Order* removed Section 22.321, all CMRS licensees continue to be subject to current EEO obligations under the Commission’s rules, including the annual complaints reporting requirement. The Commission issued a Final Regulatory Flexibility Analysis (FRFA)³⁷ that conforms to the Regulatory Flexibility Act of 1980 (RFA), as amended.³⁸ We received no petitions for reconsideration of that FRFA. In this Order on Reconsideration,

³¹ 47 CFR § 90.168, 90.168(c).

³² 47 C.F.R. § 1.815(a).

³³ *CMRS Third Report and Order*, 9 FCC Rcd at 8097-99.

³⁴ 47 C.F.R. § 90.1(b) (“This part states the conditions under which radio communications systems may be licensed and used in the Public Safety, Industrial/Business Radio Pool, and Radiolocation Radio Services. These rules do not govern the licensing of radio systems belonging to and operated by the United States.”).

³⁵ See 44 U.S.C. § 3506(c)(4).

³⁶ See 5 U.S.C. § 801(a)(1)(A).

³⁷ *Third Report and Order*, 33 FCC Rcd at 7032-38.

³⁸ The RFA, see 5 U.S.C. § 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

the Commission promulgates no additional final rules, and our present action, therefore, does not alter the Commission's previous analysis under the RFA.

15. *Contact Information.* For further information regarding this Order on Reconsideration, contact Nina Shafran at (202) 418-2781, or Nina.Shafran@fcc.gov.

V. ORDERING CLAUSES

16. IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 4(j), 301, 303, 307, 308, 309, 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), 301, 303, 307, 308, 309, 332, and 405, and Section 1.429 of the Commission's Rules, 47 CFR § 1.429, this ORDER ON RECONSIDERATION in WT Docket No. 12-40 IS ADOPTED.

17. IT IS FURTHERED 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 Section 1.429 of the Commission's Rules, 47 CFR § 1.429, the Critical Messaging Association Petition for Reconsideration is DENIED.

18. IT IS FURTHER ORDERED that this ORDER ON RECONSIDERATION SHALL BE EFFECTIVE 30 days after publication of a summary in the *Federal Register*.

19. IT IS FURTHER ORDERED, pursuant to Section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), that the Commission SHALL SEND a copy of this ORDER ON RECONSIDERATION to Congress and to the Government Accountability Office.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary