

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

In re Applications of	)	
	)	
Smith-Bagley, Inc. &	)	File No. 0000997158
WWC License L.L.C.	)	File No. 0000959496
	)	
Phase II Cellular Unserved Area Applications	)	
For New Mexico 3 RSA (Catron)	)	
Market No. 555, Block A	)	

**ORDER**

**Adopted: February 7, 2005**

**Released: February 8, 2005**

By the Assistant Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. This Order addresses three petitions seeking to deny the above-captioned applications. On September 20, 2002, McElroy Electronics Corporation (McElroy) and WWC License L.L.C. (WWC) separately filed petitions to deny the application of Smith Bagley, Inc. (SBI).<sup>1</sup> On September 25, 2002, McElroy also filed a Petition to Dismiss or Deny WWC's above-captioned amended application and associated request for waiver of Section 22.949(b)(3) of the Commission's rules permitting only one Cellular Geographic Service Area (CGSA) per application (Waiver Request).<sup>2</sup> For the reasons set forth below, we grant the petitions seeking to deny SBI's application and dismiss SBI's application as defective. We further deny McElroy's Petition to Dismiss or Deny WWC's application and grant WWC's Waiver Request.

**II. BACKGROUND**

2. By statute, the Commission is required to employ competitive bidding procedures when choosing from among pending mutually exclusive applications for certain initial licenses.<sup>3</sup> Under Part 22 of the Commission's rules, which governs site-specific application procedures for the cellular service, mutually exclusive applications are processed in filing groups.<sup>4</sup> If the earliest application accepted for filing is for an initial authorization, the Commission releases a public notice initiating a 30-day notice and cut-off filing period for competing applications.<sup>5</sup> The Commission may dismiss as defective any

<sup>1</sup> Petition to Deny, filed by McElroy Electronics Corporation (Sept. 20, 2002) (McElroy SBI Petition); Petition to Deny, filed by WWC License L.L.C. (Sept. 20, 2002) (WWC Petition).

<sup>2</sup> Petition to Dismiss or Deny of McElroy Electronics Corporation, filed by McElroy Electronics Corporation (Sept. 25, 2002) (McElroy Informal Objection). *See infra* at ¶ 24 (accepting SBI's Petition to Dismiss or Deny WWC's application as an Informal Objection to WWC's Waiver Request).

<sup>3</sup> 47 U.S.C. § 309(j); *see* 47 C.F.R. Part 1, Subpart Q, Competitive Bidding Procedures (implementing Section 309(j) of the Communications Act, as amended). Two or more pending applications are mutually exclusive if the grant of one application would effectively preclude the grant of one or more of the other applications. 47 C.F.R. § 22.131.

<sup>4</sup> 47 C.F.R. § 22.131(b).

<sup>5</sup> 47 C.F.R. § 22.131(c)(iii). The rule section provides for one exception: "for Phase I unserved area applications in the Cellular Radiotelephone Service, a one-day window filing group is used (*see* § 22.949)." *Id.*

mutually exclusive application whose filing date is outside the date range for inclusion in the filing group. Mutually exclusive applications that are submitted within the filing group, however, are given concurrent consideration.<sup>6</sup> The Commission then applies competitive bidding procedures in accordance with its competitive bidding rules to all of the mutually exclusive applications filed within the 30-day notice and cut-off period. After the auction, the Commission may grant the highest bidder's application and dismiss the other applications without prejudice.<sup>7</sup>

3. These rules governing filing groups for processing mutually exclusive applications apply to this proceeding, which stems from a letter issued on May 30, 2002,<sup>8</sup> implementing the Commission's revocation of the license granted to Alee Cellular Communications (Alee) for Station KNKN271.<sup>9</sup> Alee's license authorized cellular operations in the New Mexico 3 RSA, Market No. 555, on Block A (New Mexico 3 RSA). Under its license, Alee operated six cellular sites located on the eastern side of the New Mexico 3 RSA, running in a north-to-south direction along Interstate Highway 125.<sup>10</sup> One day after the revocation of Alee's license, on May 31, 2002, the former Commercial Wireless Division (Division)<sup>11</sup> issued a Public Notice inviting interested parties to file Phase II unserved area applications for the New Mexico 3 RSA.<sup>12</sup> On June 4, 2002, in response to the Public Notice, McElroy filed an application to provide cellular service in New Mexico 3 RSA at ten proposed locations. On June 12, 2002, the Division released a public notice accepting McElroy's application for filing,<sup>13</sup> and establishing a cut-off deadline of July 12, 2002, for filing competing applications.<sup>14</sup>

4. Four additional interested parties filed competing applications within the notice and cut-off period established by McElroy's first-filed application. All of the applications propose service coverage similar to that previously provided by Alee, but McElroy and WWC also each proposed three sites in their initial applications extending due west of the former Alee service area, including a site at Datil, New Mexico. McElroy and WWC each proposed a site at the Datil, New Mexico location unaware that the site had already been licensed to SBI under Call Sign KNKR315 pursuant to the grant of a Phase II unserved area application that SBI filed in 1998. The issues raised in the three petitions that are the subject of this Order stem from errors made in SBI's license application for Station KNKR315, and the corresponding error in the status of the station license in the Commission's ULS database that remained

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<sup>6</sup> 47 C.F.R. § 22.131(b).

<sup>7</sup> 47 C.F.R. § 22.131(c)(4)(ii)(A).

<sup>8</sup> Letter to Alee Cellular Communications from Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau (May 30, 2002).

<sup>9</sup> In re Applications of ALGREG Cellular Engineering, *Memorandum Opinion and Order and Order on Reconsideration*, 14 FCC Rcd 18524 18533-35 (1999), *aff'd*, *Alee Cellular Communications v. FCC*, slip op., No. 99-1460 (D.C. Cir. Jan. 30, 2001), *reh'g denied*, (D.C. Cir. Apr. 5, 2001), *cert. denied*, (S. Ct. Oct. 9, 2001).

<sup>10</sup> The six sites were located in three counties: Socorro NM, Socorro County (Location 1); Cabello Mountain NM, Sierra County (Location 2); Bernardo NM, Socorro County (Location 3); Truth or Consequences NM, Sierra County (Location 4); Belen NM, Valencia County (Location 5); and San Antonio NM, Sierra County (Location 6).

<sup>11</sup> In late 2003, the Commission's Wireless Telecommunications Bureau was reorganized. Many of the mobile radio services licensing issues formerly under the Bureau's Commercial Wireless Division, including Part 22 cellular service operations, are now under the purview of the Bureau's Mobility Division. FCC's Wireless Bureau Announces Reorganization, *Public Notice* (rel. Nov. 24, 2003).

<sup>12</sup> Wireless Telecommunications Bureau Implements Revocation of Cellular Call Sign KNKN271 (NM3 RSA); Phase II Unserved Area Application Rules to be Applied, *Public Notice*, 17 FCC Rcd 10518 (2002).

<sup>13</sup> Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, *Public Notice*, Report No. 1201 (June 12, 2002).

<sup>14</sup> 47 C.F.R. § 22.131(b)(3).

in error until July 16, 2002, four days after the cut-off deadline in this proceeding. The following describes in detail the facts surrounding the history of the license for Station KNKR315, as well as the status of each application filed in this proceeding.

**A. Smith Bagley Inc.'s License for Station KNKR315 – Datil, New Mexico**

5. On September 6, 1994, SBI filed a Phase I unserved area application seeking authority to construct and operate a cellular site in the New Mexico 3 RSA at Datil, New Mexico.<sup>15</sup> On May 21, 1997, the Division's Licensing and Technical Branch (Licensing Branch) granted the application, assigning the license Call Sign KNKR315. Around that same time, SBI was granted licenses to operate cellular systems under Station KNKN208 in the Arizona 3 RSA, which is the adjacent Block A cellular market west of New Mexico 3 RSA, and a license for Station KNKR316 to provide cellular service in the New Mexico 1 RSA, which is the adjacent Block A cellular market north of the New Mexico 3 RSA. While SBI constructed and is still operating under its licenses for Stations KNKN208 and KNKR316,<sup>16</sup> SBI failed to meet the construction and commencement of service requirements under Section 22.946(a) of the Commission's rules<sup>17</sup> for Station KNKR315 and, as a result, the license automatically cancelled on May 21, 1998.<sup>18</sup> The Division's Licensing Branch sent SBI a letter dated August 7, 1998, notifying SBI of the automatic cancellation of its license for Station KNKR315.<sup>19</sup> As a result of the automatic cancellation, the status of the license for Station KNKR315 was entered into ULS as "Terminated."

6. Despite the automatic cancellation and associated notification, SBI filed a Phase II unserved area application on September 16, 1998, proposing to modify its license for Station KNKR315 by adding a second cell site northwest of Datil, New Mexico.<sup>20</sup> SBI's application was granted on November 12, 1998.<sup>21</sup> While granting the application was substantively proper, a new call sign should have been assigned to the license. SBI's application, however, was granted under Call Sign KNKR315 as requested in the application,<sup>22</sup> but the status of KNKR315 remained in ULS as Terminated. SBI notified the Commission of the error on July 11, 2002, through a Petition to Dismiss or Deny McElroy's first-filed application that it filed on that day<sup>23</sup> and the status of SBI's license in ULS for Station KNKR315 was changed to "Active" on July 16, 2002.

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<sup>15</sup> File No. 07639-CL-P1-95.

<sup>16</sup> The license for Station KNKR316 was granted in 1998, and the license for Station KNKN208 was granted in 1999, each with ten-year license terms.

<sup>17</sup> 47 C.F.R. § 22.946(a).

<sup>18</sup> 47 C.F.R. § 1.946(c) (formerly 47 C.F.R. § 22.144(b) (1998)).

<sup>19</sup> Letter from Roger S. Noel, Chief, Licensing & Technical Analysis Branch, Commercial Wireless Division to J. Justin McClure, Esq., Counsel to Smith Bagley, Inc. (Aug. 7, 1998) (stating that "[a] review of Commission records indicates that an FCC Form 489 has not been filed within the 12 month period for station KNKR315 as required by Section 22.946(a) of the rules. In view of the foregoing and pursuant to Section 22.144(b) of the Commission's rules, the authorization for station KNKR315 is hereby terminated."); *Public Notice*, Report No. CWS-98-46 at 3 (Aug. 20, 1998) (listing 07639-CL-P1-95, KNKR315, 555A1, Smith Bagley, Inc. as terminated by letter effective August 7, 1998).

<sup>20</sup> File No. 03925-CL-P2-98. Letter from J. Justin McClure, Esq., Counsel for Smith Bagley, Inc. to Steven Weingarten, Chief, Commercial Wireless Division (Sept. 16, 1998).

<sup>21</sup> *Public Notice*, Report No. CWS-99-7 (Nov. 12, 1998). SBI later amended its license to reduce the service area boundary. The modification was granted on April 1, 1999.

<sup>22</sup> Only the site proposed in SBI's modified Phase II unserved area application is licensed under Station KNKR315.

<sup>23</sup> Petition to Dismiss or Deny, filed by Smith Bagley, Inc. (July 11, 2002) (SBI July 11, 2002 Petition).

## B. McElroy Electronics Corporation's Applications

7. The ten cellular sites that McElroy proposed in its first-filed application included seven sites that would provide service to an area virtually identical to the area formerly served by Alee, together with three sites, Magdalena, Datil, and Quemado, extending due west of the former Alee service area. The Magdalena site is the eastern-most site and the Quemado site is farthest west, with Datil located between the two.<sup>24</sup> According to McElroy, over the course of the 30-day notice and cut-off filing period, it discovered that SBI was licensed and operating under Station KNKR315 at McElroy's proposed Datil site.<sup>25</sup> On July 11, 2002, the 29<sup>th</sup> day of the notice and cut-off period, McElroy amended its first-filed application to delete the proposed Datil and Quemado sites. McElroy deleted the proposed Quemado site from its first-filed application because Commission rules limit each application to one CGSA,<sup>26</sup> and without the Datil site, authority to operate at Quemado requires a stand-alone CGSA.<sup>27</sup> McElroy therefore separately filed, on the same day, July 11, 2002, a Phase II unserved area application for the Quemado site.<sup>28</sup> Also on July 11, 2002, SBI filed its Petition to Dismiss or Deny McElroy's first-filed application, alleging that McElroy's proposal would cause harmful interference to its Station KNKR315 licensed at the Datil site. The Division's Policy and Rules Branch dismissed SBI's Petition to Deny as moot because McElroy had amended its application to remove the potential interference.<sup>29</sup>

## C. Commnet Capital, LLC Application and ALLTEL Communications of the Southwest Limited Partnership Application

8. Commnet Wireless, LLC (Commnet) submitted the second-in-time mutually exclusive application on June 12, 2002,<sup>30</sup> one day after McElroy's application was accepted for filing. ALLTEL Communications of the Southwest Limited Partnership (ALLTEL) filed a competing application on July 11, 2002, the 29<sup>th</sup> day of the notice and cut-off period.<sup>31</sup> Neither of these applications proposes service at any of the three western sites, Magdalena, Datil, or Quemado, New Mexico.

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<sup>24</sup> FCC 601 Main Form, File No. 0000913369. The ten (10) proposed locations included: Bernardo NM, Socorro County (Location 1); Caballo NM, Sierra County (Location 2); Datil NM, Catron County (Location 3); Socorro NM, Socorro County (Location 4); Magdalena NM, Socorro County (Location 5); Belen NM, Valencia County (Location 6); Quemado NM, Catron County (Location 7); San Antonio NM, Socorro County (Location 8); Socorro NM, Socorro County (Location 9); and Truth or Consequences NM, Sierra County (Location 10).

<sup>25</sup> SBI is authorized to operate at a tower located approximately 9.7 miles northwest of Datil NM, at the location coordinates of 34-15-00.0 N, 107-57-17.0 W. McElroy proposed operations at the exact same location.

<sup>26</sup> 47 C.F.R. § 22.949(b)(3).

<sup>27</sup> In amending its application, FCC File No. 0000913369, McElroy also reduced power at the Magdalena site.

<sup>28</sup> FCC 601 Main Form, File No. 0000959846 (July 11, 2002).

<sup>29</sup> In re Application of McElroy Electronics Corporation For Authorization to Construct and Operate a Cellular Station in Market No. 555, New Mexico RSA 3, *Order*, 17 FCC Rcd 23657 (CWD 2002). In a letter filed on July 22, 2002, SBI acknowledged that McElroy's amended application fully protects SBI's Datil site from interference and voluntarily withdrew its Petition to Deny McElroy's application. Letter from Todd Slamowitz, Counsel for Smith Bagley, Inc., to Marlene Dortch, Secretary (July 22, 2002).

<sup>30</sup> FCC 601 Main Form, filed by Commnet Capital, LLC, File No. 0000922001 (June 12, 2002). Commnet's application was accepted for filing on June 19, 2002, *Public Notice*, Report No. 1207 (June 19, 2002).

<sup>31</sup> FCC 601 Main Form, File No. 0000959430 (July 11, 2002). ALLTEL's application was accepted for filing on July 17, 2002, Wireless Telecommunications Bureau Site-by-Site Accepted for Filing, *Public Notice*, Report No. 1231 at 27 (July 17, 2002) (*July 17, 2002 Public Notice*).

**D. WWC License L.L.C.'s Application**

9. WWC also filed its competing application on July 11, 2002, within the 30-day notice and cut-off window established by McElroy's first-filed application. WWC's application is virtually identical to McElroy's first-filed application, including proposals for the Magdalena, Datil, and Quemado sites.<sup>32</sup> On July 25, 2002, the Division's Licensing Branch returned WWC's application along with a letter directing WWC to amend its application within 60 days of the date of the letter to demonstrate that its proposal would not cause unlawful interference to the Datil site authorized under SBI's license for Station KNKR315 (July 25 Letter).<sup>33</sup> In response, on September 5, 2002, WWC filed an amendment to its application deleting the Datil site and reducing power at its proposed Magdalena and Quemado sites. As in McElroy's situation, deleting the Datil site left a gap in the service area proposed in WWC's initial application, resulting in a distinct CGSA for the proposed Quemado site. Rather than submitting a separate application for the Quemado site, however, WWC requests waiver of Section 22.949(b)(3) of the Commission's Rules, which permits only one CGSA per application.<sup>34</sup> In the alternative, WWC requests a waiver of the filing date requirement set forth under Section 22.131(b) of the Commission's rules to allow it to file a separate application for the Quemado site. Finally, WWC states that if the Commission denies its alternative waiver requests, it will withdraw its proposed Quemado site.<sup>35</sup> On September 25, 2002, McElroy filed its Petition to Dismiss or Deny WWC's amended application as defective.<sup>36</sup>

**E. Smith Bagley, Inc.'s Applications**

10. SBI filed its competing application on July 12, 2002, the last day of the notice and cut-off period, proposing service that would cover the area in the New Mexico 3 RSA east of its Station KNKR315 located at Datil, New Mexico. Specifically, SBI's application proposes service at the Magdalena site in addition to the area formerly covered by Alee. The application does not propose service at the Quemado site.<sup>37</sup> Rather, on August 14, 2002, SBI filed a separate Phase II unserved area application for a new cellular system at the Quemado site.<sup>38</sup> According to SBI, it filed its Quemado application within the 30-day period established by McElroy's separately filed Quemado application, which was accepted for filing on July 17, 2002.<sup>39</sup> On September 20, 2002, McElroy and WWC filed

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<sup>32</sup> FCC 601 Main Form, File No. 0000959496 (July 11, 2002). WWC's application proposed ten sites, nine of which were identical in location to McElroy's proposals. WWC did not include the Bernardo NM, Socorro County location proposed in McElroy's application. Rather, WWC proposes a nearby site at Bosque NM in Socorro County (Location 1). WWC's application was accepted for filing on July 17, 2002. *July 17, 2002 Public Notice* at 28-29.

<sup>33</sup> Letter to William J. Hackett, Western Wireless Corporation, from Michael A. Ferrante, Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division (July 25, 2002).

<sup>34</sup> FCC File No. 0000959496, at Ex. 9, Request for Waiver of Section 22.949(b)(3) at 2 (Waiver Request).

<sup>35</sup> Waiver Request at 3.

<sup>36</sup> McElroy Informal Objection at 1. WWC filed an opposition on October 9, 2002, Opposition to Petition to Dismiss or Deny, filed by WWC License L.L.C. (Oct. 9, 2002). McElroy filed a motion on October 17, 2002, seeking an extension of time to October 28, 2002, for filing its reply, Motion for Extension of Time, filed by McElroy Electronics Corporation (Oct. 17, 2002). Counsel for WWC consented to the extension. We therefore grant the motion. McElroy filed its reply on October 28, 2002, Reply of McElroy Electronics Corporation to Opposition to Petition to Dismiss or Deny, filed by McElroy Electronics Corporation (Oct. 28, 2002) (McElroy Informal Reply).

<sup>37</sup> FCC 601 Main Form, File No. 0000960815 (July 12, 2002). SBI's initial application was also accepted for filing on July 17, 2002. *July 17, 2002 Public Notice* at 29-30.

<sup>38</sup> FCC 601 Main Form, File No. 0000997158 (Aug. 14, 2002). SBI's second application was accepted for filing on August 21, 2002. *Public Notice*, Report No. 1263 (Aug. 21, 2002).

<sup>39</sup> *July 17, 2002 Public Notice* at 29.

individual petitions to dismiss SBI's Quemado application as defective, arguing that SBI filed the application outside of the 30-day notice and cut-off window established by McElroy's first-filed application.<sup>40</sup>

### III. DISCUSSION

#### A. Smith Bagley, Inc. Quemado Application

11. We dismiss SBI's application proposing service at the Quemado, New Mexico site as defective because SBI filed the application outside the 30-day notice and cut-off period established by the public notice accepting McElroy's first-filed application for filing. The Commission has, over time, adopted various cut-off rules, so called because applicants filing before the deadlines are cut off from competition against late-filing parties.<sup>41</sup> The Commission has repeatedly stated that the cut-off period established by the first-filed mutually exclusive application applies to all mutually exclusive filings.<sup>42</sup> Thus, once the Commission places that initial application on public notice as accepted-for-filing, all applications proposing CGSAs that overlap the CGSA proposed in that first-filed application must be filed within the notice and cut-off period established by the first-filed application to be given concurrent consideration. This rule applies to applications that are either directly or indirectly mutually exclusive with the first-filed application.<sup>43</sup> Similarly, the cut-off deadline established by the first-filed application applies to additional mutually exclusive facilities proposed by the original applicant.<sup>44</sup> Section 22.131(c)(3)(iii) of the Commission's rules states that a 30-day notice and cut-off period is used when

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<sup>40</sup> SBI filed a consolidated opposition to both petitions to deny. Opposition to Petitions to Dismiss, filed by Smith Bagley Inc. (Oct. 3, 2002) (SBI Opposition). McElroy and WWC separately filed replies to SBI's Opposition. Reply of McElroy Electronics Corporation to Opposition to Petition to Dismiss or Deny, filed by McElroy Electronics Corporation (Oct. 15, 2002) (McElroy SBI Reply); Reply to Opposition to Petitions to Dismiss or Deny, filed by WWC License L.L.C. (Oct. 16, 2002) (WWC Reply).

<sup>41</sup> See *Florida Institute of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992) (*Florida Institute*) (explaining that "[i]n response to the holding in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) that the Commission must afford a comparative hearing to mutually exclusive applications for a broadcast license, the Commission established various "cut-off" rules, so named because applicants filing before the deadlines are cut off from competition against late-filing parties).

<sup>42</sup> In re Applications of William G. Bowles, Jr. d/b/a Mid-Missouri Mobilfone, *Memorandum Opinion and Order and Order on Reconsideration*, 61 Rad. Reg. 2d 20 (CCB 1986) (*William G. Bowles*). To ensure consistent and impartial treatment of applicants, the Commission strictly enforces its cut-off rules even when enforcement causes harsh results in particular cases. See *Florida Institute*, 952 F. 2d at 550 (stating that to promote the purpose of the cut-off rules and "to ensure consistent and impartial treatment of applicants, the FCC has insisted on strict enforcement of the rules, even when this causes harsh results in particular cases) (citing *RKO General Inc. (WNAC-TV)*, 89 F.C.C. 2d 297, 321 n.96 (1982); *Nazarene Theological Seminary Radio Corp. (KTSR)*, 52 Rad Reg. (P&F) 559, 563 (Broadcast Bur. 1982)).

<sup>43</sup> Another way of explaining this principle is to state that the rule applies to applications proposing CGSAs that either directly or indirectly overlap with the CGSA proposed in the first-filed application.

<sup>44</sup> *William G. Bowles*, 61 Rad. Reg. 2d 20 (CCB 1986). In *William G. Bowles*, the Common Carrier Bureau dismissed the first-filed applicant's later-filed applications where those later-filed applications were mutually exclusive with a competing application that was filed within the notice and cut-off period of the original applicant's first-filed application, but the original applicant filed its later applications after the cut-off deadline of its own first-filed application. *Id.* at ¶ 13. Similarly, in *Pacific Bell*, the Mobile Services Division rejected the original applicant's later-filed application even after the applicant had voluntarily withdrawn its first-filed application. In that case, the later-filed application was mutually exclusive with a competing application that was filed within the notice and cut-off period of the original applicant's first-filed application and the original applicant filed its second application after the cut-off deadline established by its first-filed application. In re Application of Pacific Bell, *Memorandum Opinion and Order*, 3 FCC Rcd 3692 (MSD 1988).

applications are filed for initial authorizations.<sup>45</sup> The Licensing Branch placed McElroy's first-filed application on public notice on June 12, 2002, establishing a cut-off deadline of July 12, 2002. SBI filed its Quemado application on August 14, 2002, 33 days after the notice and cut-off deadline for filing competing applications.

12. In dismissing SBI's Quemado application as filed in an untimely manner, we reject SBI's argument that its Quemado application and McElroy's first-filed application were never competing applications. SBI explains that McElroy had amended its first-filed application to delete its Quemado site so that the CGSA of McElroy's amended first-filed application did not overlap with the CGSA in SBI's proposed Quemado application at the time SBI filed its Quemado application.<sup>46</sup>

13. SBI supports its argument that its Quemado application is not untimely by citing to *In the Matter of Plaincom, Inc.*<sup>47</sup> Relying heavily on the rule that whether "an application is timely must be determined as of the time of filing, not by an event occurring after the cut-off date," SBI argues that McElroy "withdrew" its proposed Quemado site from its first-filed application before SBI filed its own Quemado application.<sup>48</sup> SBI further contends that the Commission's rule that the "first-filed application, even if subsequently dismissed, establishes the cut-off period for all later competing applications" is inapplicable because SBI filed its Quemado application after, not before, McElroy amended its first-filed application to delete its originally proposed Quemado site.<sup>49</sup> In *Plaincom*, the Commission explained that where the first-filed application is dismissed after the second application is filed, deeming the untimeliness of the second application to be cured retroactively by the subsequent dismissal of the first application would deprive interested parties of the opportunity to file competing applications against the second and untimely application.<sup>50</sup> The Commission further explained that where a first-filed application is dismissed before the untimely second application is filed, the public notice listing the second application as accepted-for-filing initiates a new notice and cut-off period, during which competing

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<sup>45</sup> 47 C.F.R. § 22.131(c)(3)(iii).

<sup>46</sup> SBI Opposition at 5-6.

<sup>47</sup> In the Matter of Plaincom, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 11889 (2000) (*Plaincom*). *Plaincom* involved a first-filed application and Plaincom, Inc.'s competing application that was filed several weeks after the cut-off deadline. The competing application was dismissed as untimely and the first-filed application was subsequently dismissed as defective. Plaincom, Inc. appealed the dismissal of its application up to the Commission, arguing that the dismissal of the first-filed application cured the untimeliness of its own application. The Commission rejected Plaincom, Inc.'s argument.

<sup>48</sup> SBI Opposition at 6-7 (citing *Plaincom*, 15 FCC Rcd at 11892, ¶ 7). SBI takes the quote "whether an application is timely must be determined as of the time of filing, not by an event occurring after the cut-off date," from a portion of *Plaincom* where the Commission is summarizing a daisy chain case, *Leo V. Carmody*, In the Matter of Leo V. Carmody, *Memorandum Opinion and Order*, 4 FCC Rcd 5459, 5460, ¶ 9 (CCB 1989). *Plaincom*, 15 FCC Rcd at 11892, ¶ 7. The Commission explicitly states that *Carmody* "did not involve the dismissal of a first-filed application; instead, it involved application of the daisy chain rule." *Id.* As the Commission explained, Leo V. Carmody filed an application to provide service in Greenville, New York. The Greenville application was mutually exclusive with a previously filed application to serve Monticello, New York. Although both applications were part of a daisy chain, neither application was the first-filed application. The Greenville application was timely with respect to the Monticello application, but was filed more than sixty days after the cut-off date of the first-filed application. After the Greenville application was filed, the Monticello application was dismissed. *Id.* The Commission affirmed in *Plaincom* that as a consequence of the dismissal of the Monticello application, the Greenville application was no longer part of a daisy chain with the first-filed application, so it did not have to be filed by the cut-off date established by that application. *Id.* SBI provides no analysis on how this case applies to the instant proceeding or any evidence that any event occurred after the cut-off date established by McElroy's first-filed application that would deem SBI's Quemado application as filed in a timely manner.

<sup>49</sup> SBI Opposition at 6.

<sup>50</sup> *Plaincom*, 15 FCC Rcd at 11893, ¶ 9.

applications may be filed.<sup>51</sup> *Plaincom*, however, is inapplicable in this proceeding because McElroy's first-filed application has neither been dismissed nor withdrawn.

14. Consistent with Commission rules, the July 12, 2002 cut-off deadline in this proceeding applies to all applications that are either directly or indirectly mutually exclusive with McElroy's first-filed application, including additional mutually exclusive facilities proposed by McElroy. Stated another way, once the Division placed McElroy's first-filed application on public notice as accepted-for-filing, all applications proposing CGSAs that overlap the CGSA proposed in McElroy's first-filed application must be filed within the 30-day notice and cut-off period established by McElroy's first-filed application to be given concurrent consideration. Commnet, ALLTEL, WWC, and SBI individually filed initial applications meeting that requirement.

15. In addition, pursuant to Commission rules that permit applicants to submit minor amendments to their applications,<sup>52</sup> McElroy amended its first-filed application for the purpose of curing defects in its initial proposal that would have caused unlawful interference to operations authorized under SBI's license for Station KNKR315 at Datil, New Mexico. By curing the defects in its application, McElroy preserved its right to protection for its application from competing applications filed after the cut-off deadline. In addition, McElroy filed a new application for the Quemado site prior to the cut-off deadline, similarly preserving its right to protection for that proposed site from competing applications filed after the same cut-off deadline.<sup>53</sup> McElroy's amendment and application for additional facilities at the Quemado site did not alter the cut-off deadline established by its first-filed application. McElroy's actions merely preserved its ability to be given concurrent consideration with other applications filed in a timely manner within that notice and cut-off period. SBI, on the other hand, filed its Quemado application outside the notice and cut-off period established by McElroy's first-filed application.

16. While SBI contends that McElroy's separately filed Quemado application initiated a new 30-day notice and cut-off period and that its August 14, 2002 Quemado application is therefore filed in a timely manner,<sup>54</sup> SBI raises a concern in its Opposition that its Quemado application may be untimely filed in the context of the Commission's daisy chain rule<sup>55</sup> because WWC filed an application before the July 12, 2002 cut-off deadline that also proposed a site at Quemado, New Mexico.<sup>56</sup> SBI counters its own contention arguing that WWC's application is so defective because of the interference that it would cause to SBI's Station KNKR315 that WWC's application "does not warrant concurrent consideration with SBI's Quemado application" and "should be dismissed."<sup>57</sup> We initially dismiss SBI's argument as a late-filed petition to deny WWC's initial application.<sup>58</sup> Section 1.939(a)(2) of the Commission's rules

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<sup>51</sup> *Id.*; see *William G. Bowles, Jr.*, 61 Rad. Reg. 2d at ¶ 13 (stating that "[t]he subsequent dismissal of the first-filed application does not alter the applicable cut-off period").

<sup>52</sup> Minor amendments filed prior to a pending application being designated for hearing or listed in a public notice as accepted for filing for competitive bidding are permitted as a matter of right under Commission rules. 47 C.F.R. § 1.927.

<sup>53</sup> See 47 C.F.R. § 22.949(b)(2) (providing that "[t]here is no limit to the number of phase II applications that may be granted on each channel block in each market. ... [m]utually exclusive applications are processed using the general procedures in § 22.131").

<sup>54</sup> SBI Opposition at 5-6.

<sup>55</sup> Formerly 47 C.F.R. § 22.31(c).

<sup>56</sup> SBI Opposition at 7-9.

<sup>57</sup> SBI Opposition at 7-9.

<sup>58</sup> In its Opposition, SBI explains that although it was aware of the defects in WWC's application, SBI elected not to file a petition to deny at the time WWC filed its application. SBI Opposition at 4. Specifically, SBI stated, that

(continued....)



provides that petitions to deny must be filed no later than 30 days after the date of the public notice listing the application as accepted for filing.<sup>59</sup> WWC's application was accepted for filing on July 17, 2002, establishing a deadline for petitions to deny of August 16, 2002. SBI filed its Opposition, which presents its argument to dismiss WWC's application, on October 3, 2002, 77 days after WWC's application was accepted for filing.

17. Moreover, the daisy chain rule is inapplicable in this case because SBI's Quemado application is not indirectly mutually exclusive with McElroy's first-filed application. As we have already stated, the cut-off period established by the first-filed mutually exclusive application applies to all mutually exclusive filings. Under Commission rules, the CGSA proposed in McElroy's first-filed application does not shape-shift as events take place during the notice and cut-off period. The amendment of McElroy's first-filed application did not alter the CGSA proposed in that first-filed application nor did it alter the cut-off deadline in this proceeding. McElroy's first-filed application proposed a site at Quemado, New Mexico; WWC's application proposed a site at Quemado, New Mexico; SBI filed an application proposing a site at Quemado, New Mexico. Those proposals are directly mutually exclusive. The daisy chain rule is inapplicable.

18. We note, however, that even if the daisy chain rule were relevant in this case, we would reject SBI's argument opposing application of the rule. SBI urges us to "enforce [its] right to interference-free operation" by dismissing WWC's application, arguing that SBI's Quemado application cannot be cut-off by an application that is "fundamentally defective."<sup>60</sup> Commission policy and rules protect existing stations from unlawful interference.<sup>61</sup> While that type of technical defect in an application may result in the dismissal of the application, an application with a proposal that would result in unlawful interference or even the dismissal of that application generally cannot cure the untimeliness of another application,<sup>62</sup> and SBI provides no legal support to demonstrate otherwise.

19. Finally, SBI has held a license for many years to provide cellular service under the Call Sign KNKR315 in the western portion of the New Mexico RSA 3 market at Datil, New Mexico. By stating in its July 11, 2002 Petition to Dismiss or Deny McElroy's first-filed application that "[u]pon review of McElroy's application, SBI discovered that its Datil Site, operating under Call Sign KNKR315, had been terminated in the Commission's ULS database for unspecified reasons," ... and "that each of McElroy's proposed service contours for each of its three site locations at Datil, NM, Quemado, NM, and Magdalena, NM overlaps SBI's existing authorized Datil site,"<sup>63</sup> SBI fully acknowledges that it was aware that McElroy's first-filed application included a proposal for the Quemado site and was informed about the circumstances in this proceeding in making its decisions on when to file its applications.<sup>64</sup> We

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"[p]erfectly aware that WWC's application was defective, and believing that it had been returned, SBI did not consider a challenge to the application." *Id.*

<sup>59</sup> 47 C.F.R. § 1.939(a)(2).

<sup>60</sup> SBI Opposition at 8-9.

<sup>61</sup> 47 C.F.R. §§ 22.911-22.917.

<sup>62</sup> An applicant might withdraw its first-filed application or the Commission might dismiss the application before any mutually exclusive applications are filed, which could result in a new filing and a new notice and cut-off period, but that is not the situation in this case.

<sup>63</sup> SBI July 11, 2002 Petition at 2.

<sup>64</sup> We cannot disregard the diligence that each of the five applicants has shown in filing applications before the cut-off deadline established by McElroy's first-filed application. The Commission has long recognized that diligent applicants have a legitimate expectation that we will enforce the cut-off rules. *See Florida Institute of Technology v. FCC*, 952 F.2d 549, 554 (D.C. Cir. 1992) (stating that in contrast to the applicant that filed after the cut-off date, the applicant that filed a mutually exclusive application in a timely manner had "at all times complied with the cut-off

(continued....)

find that SBI filed its Quemado application in an untimely manner outside the 30-day notice and cut-off period established by McElroy's first-filed application. Accordingly, we dismiss SBI's Quemado application as defective pursuant to Section 1.934(a) of the Commission's rules.<sup>65</sup>

#### **B. WWC License L.L.C. Amended Application and Request for Waiver**

20. We next turn to WWC's amended application and associated Waiver Request, and McElroy's challenge to that amended application. As we stated above, WWC filed its amended application on September 5, 2002, along with a request for waiver of Section 22.949(b)(3) of the Commission's rules, which permits only one CGSA per application. In the alternative, WWC seeks waiver of the filing date requirement, set forth under Section 22.131(b) of the Commission's rules, to allow WWC to file a separate application for the Quemado site after the cut-off deadline established by McElroy's first-filed application.<sup>66</sup> We grant WWC waiver of Section 22.949(b)(3). We therefore will not consider WWC's request for waiver of Section 22.131(b) of the Commission's rules.

21. We initially find that McElroy filed its Petition to Dismiss or Deny WWC's application in an untimely manner. Section 1.939(a)(2) provides that petitions to deny non-auctionable applications must be filed no later than 30 days after the date of the public notice listing the application or major amendment to the application as accepted for filing.<sup>67</sup> McElroy reasons that Section 1.939(a)(2) is "inapposite regarding the timeliness of [its] petition" because Section 22.131(b), the rule section that governs this proceeding for granting one application in a group of mutually exclusive applications, directs the Commission to employ auction procedures.<sup>68</sup> The purpose of each rule section, however, differs from the other and the procedural requirements of Section 1.939(a)(2) precede the procedural requirements of Section 22.131(b). Section 1.939(a)(2) of the Commission's rules outlines those procedures used to allow third parties to assist the Commission in determining whether a non-auctionable application is defective and should be dismissed in the first place. For applications that are determined finally to be acceptable for filing, Section 22.131(b) of the Commission's rules outlines the procedures used for determining whether applications are mutually exclusive and, if so, whether competitive bidding will be used to determine which of those mutually exclusive applications may be granted.

22. We also reject McElroy's arguments that its Petition to Dismiss or Deny is timely because WWC's separate CGSA constitutes either an initial authorization or a major modification to an existing station. McElroy first argues that Section 22.131(d)(2)(i) of the Commission's rules defines an application for a new station as a request for an "initial authorization" and that Section 1.929(a) of the Commission's rules defines an application for an "initial authorization" as a major action, initiating a new 30-day notice and cut-off period.<sup>69</sup> WWC did not file an application on September 5, 2002, for its

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rules and, as the Commission (and this court) has long recognized, such diligent applicants have a legitimate expectation that the cut-off rules will be enforced" (citing *City of Angels Broadcasting, Inc. v. FCC*, 745 F.2d 656, 663 (D.C. Cir. 1984)).

<sup>65</sup> 47 C.F.R. § 1.934(a).

<sup>66</sup> Waiver Request at 2.

<sup>67</sup> 47 C.F.R. § 1.939(a)(2).

<sup>68</sup> McElroy Informal Reply at 2-3. McElroy contends that WWC's citing in this proceeding, specifically in its Petition to Deny SBI's application, to "the rules section directing the Commission to use auctions when granting an application in a group of mutually exclusive applications, ... demonstrates that Section 1.939(a)(2) is inapposite regarding the timeliness of McElroy's Petition." *Id.* at 3 (emphasis in original). We note that McElroy filed its Petition to Dismiss or Deny under Section 1.939 of the Commission's rules, 47 C.F.R. § 1.939. McElroy Informal Objection at 1.

<sup>69</sup> McElroy Informal Reply at 3 (citing 47 C.F.R. § 22.131(d)(2)(i)).

proposed Quemado site. WWC filed an amendment to its initial application deleting the Datil site and reducing the Magdalena and Quemado sites. The amendments also resulted in two separate CGSAs, causing WWC to seek a waiver of the Commission's rule permitting only one CGSA per application. Denial of the waiver could result in dismissal of WWC's application, but the amendments are considered minor under Commission rules and do not initiate a new pleading cycle for filing petitions to deny.<sup>70</sup>

23. For the same reasons, we reject McElroy's contention that Section 1.947(a) of the Commission's rules classifies WWC's amended application as a major modification, initiating a new 30-day filing period for petitions to deny under Section 1.939(a)(2) of the Commission's rules. Section 1.947(a) states, in relevant part, that a major modification to an existing station requires Commission approval.<sup>71</sup> McElroy argues that because the amendment required under the July 25, 2002 letter sent to WWC "implies" that Commission approval is required, WWC's September 5 filing is therefore "also classified as a major amendment under Section 1.947(a)."<sup>72</sup> This argument is groundless. Section 1.947 of the Commission's rules outlines procedures for filing and processing major or minor modification applications, not amendments to applications. The plain language of the rule states that major modifications require Commission approval, not that an action requiring Commission approval constitutes a major amendment to an application.

24. McElroy's Petition to Dismiss or Deny is late-filed because WWC's application was accepted for filing on July 17, 2002, establishing a deadline for filing petitions to deny on August 16, 2002. McElroy filed its Petition to Dismiss or Deny WWC's application on September 25, 2002, 40 days after the deadline, without seeking a waiver of the deadline. We, however, grant McElroy's request, in the alternative, to consider its pleading as an informal objection.<sup>73</sup> Because Section 1.925 does not provide formal procedures for responding to requests for waivers, we grant McElroy's request to consider its pleading as an Informal Objection to WWC's Waiver Request under Section 1.41 of the Commission's rules.<sup>74</sup>

25. While we grant McElroy's request, we deny the Informal Objection and grant WWC waiver of Section 22.949(b)(3) of the Commission's rules. We may grant a waiver pursuant to Section 1.925 of the Commission's rules if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>75</sup> We find that strict application of Section 22.949(b)(3) in this case would not serve the underlying purpose of the rule and would be contrary to the public interest.

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<sup>70</sup> Section 1.929 of the Commission's rules, 47 C.F.R. 1.929, lists the actions classified as major. 47 C.F.R. § 1.929(a). Any change not specifically listed in Sections 1.929(a) through (j), including the deletion and reduction of cell sites in a pending application, is considered minor. *Id.* § 1.929(k).

<sup>71</sup> 47 C.F.R. § 1.947(a).

<sup>72</sup> McElroy Informal Reply at 4.

<sup>73</sup> McElroy Informal Objection at 4, n.8; McElroy Informal Reply at 5.

<sup>74</sup> 47 C.F.R. § 1.41. Section 1.41 provides in relevant part, "[e]xcept where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally." *Id.*

<sup>75</sup> 47 C.F.R. § 1.925.

26. The Commission's underlying purpose for permitting only one CGSA per application is to promote administrative efficiency in the effective evaluation of mutually exclusive applications.<sup>76</sup> In proposing the rule, the Commission explained that multiple CGSAs in the same application could create unworkable mutually exclusive applications, where, because of a possible 'daisy chain' effect, it would be extremely difficult to determine which applications were mutually exclusive.<sup>77</sup> That concern is not an issue with respect to WWC's amended application and the other applications filed in a timely manner in this proceeding. WWC's amended application is virtually identical to McElroy's amended application and separately filed Quemado application. In fact, all of the applications are virtually identical to each other, except WWC and McElroy each propose sites for Quemado, New Mexico. None of these proposals has created unworkable mutually exclusive applications resulting in some daisy chain effect that is extremely difficult to determine which applications are in fact mutually exclusive. The issues raised in this proceeding have stemmed entirely from the status error reflected in SBI's license for Station KNKR315. Granting WWC's request for waiver of Section 22.949(b) does not result in any further delay in processing the mutually exclusive applications in this proceeding.

27. In finding that strict application of the rule will not serve the underlying purpose of Section 22.949(b)(3), we also reject McElroy's argument that WWC's application should be dismissed because the circumstances resulting in WWC's defective application are neither unique<sup>78</sup> nor inequitable.<sup>79</sup> According to McElroy, the circumstances are not unique because both applicants researched the same public documents and submitted applications containing the same technical defects.<sup>80</sup> McElroy fails, however, to reconcile its arguments with cases where the Commission has granted waivers to entities where the same facts affect and relief is applied to several parties similarly situated, sometimes even where the affected parties have not sought waiver relief.<sup>81</sup>

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<sup>76</sup> In the Matter of Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications of Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Notice of Proposed Rulemaking*, 5 FCC Rcd 1044, 1045 ¶ 16 (1990).

<sup>77</sup> *Id.* The Commission repeated its underlying purpose of efficient processing of applications in adopting the rule section. In the Matter of Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications of Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Report and Order and Memorandum Opinion and Order and Order on Reconsideration*, 6 FCC Rcd 6185 (1991). The cellular unserved area rules permitting only one CGSA per application were initially adopted in Section 22.902(b)(4).

<sup>78</sup> McElroy Informal Objection at 7.

<sup>79</sup> McElroy Informal Objection at 7.

<sup>80</sup> McElroy Informal Objection at 7. WWC states that "[p]rior to filing its application, [it] researched thoroughly to determine whether any licensees were operating or had rights to operate within the New Mexico 3 – Catron RSA. [WWC's] research included a review of the FCC's ULS, paper and microfiche records, as well as commercially-available databases such as Berry Best. [WWC] determined that Smith Bagley had received an authorization for station KNKR315, and that the Commission had terminated the authorization for failure to construct prior to the expiration of the construction period on May 21, 1998. On September 16, 1998, Smith Bagley filed an application to modify its terminated station, but there was no evidence in the Commission's records that this, or any of Smith Bagley's proposals, had been constructed. In addition, ULS listed the authorization for station KNKR315 as 'Terminated.' Thus, [WWC] reasonably concluded that station KNKR315 was not operational, and applied to serve the subject areas." Waiver Request at 2. McElroy states that it "researched the same documents and sources mentioned by WWC and reached the same erroneous conclusions before filing its first application to serve the western portion of New Mexico RSA 3. McElroy Informal Objection at 7. Thus, according to McElroy, "WWC's claim that its experience was somehow unique collapses under scrutiny." *Id.*

<sup>81</sup> See, e.g., In the Matter of National Exchange Carrier Association Petition to Amend Section 69.104 of the Commission's Rules, *Order Granting Petition for Rulemaking, Notice of Proposed Rulemaking, and Order Granting Interim Partial Waiver*, 19 FCC Rcd 13591, 13604 and n.99 (2004) (granting, in relevant part, partial interim waiver of Section 69.104 of the Commission's rules to all similarly situated rate-of-return carriers, including

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28. McElroy also argues that circumstances in this proceeding are not inequitable because McElroy cured the defects in its initial application prior to the cut-off deadline, while WWC did not, which, according to McElroy, demonstrates that WWC's errors in its application are "attributable to WWC's own acts and omissions" and lack of due diligence.<sup>82</sup> While choosing not to disclose how it discovered the defects in its own application,<sup>83</sup> McElroy insinuates that WWC could have ascertained the operational status of KNKR315 simply by test-driving the New Mexico RSA 3 market.<sup>84</sup> McElroy further hints that WWC could have discovered the status error through what McElroy deems to be "inconsistent information" regarding Station KNKR315 in the Commission's ULS database.<sup>85</sup> While WWC or any other applicant may have performed a drive-test or interpreted information in the Commission's database in the same way that McElroy might have interpreted the information, McElroy fails again to provide any legal basis on which we would apply these measures regarding a final determination for WWC's Waiver Request.

29. Similarly, McElroy's argument that Commission due diligence public notices issued prior to an auction<sup>86</sup> is also misplaced. McElroy quotes the standard language from one of these public notices as strongly encouraging potential bidders "to physically inspect any sites located in, or near, the market for which they plan to bid."<sup>87</sup> McElroy then concludes that "[t]he strong encouragement ... demonstrates that it would have been eminently reasonable for WWC ... to inspect NM RSA 3 before filing its application."<sup>88</sup> McElroy, however, does not explain why this standard language from a due diligence public notice issued prior to auctions applies to WWC's amended application and request for waiver of the Commission's rule permitting only one CGSA per application.

30. The due diligence public notices remind potential bidders in the competitive bidding process of two things. The first is that certain filings may remain pending before the Commission after the auction closes, the resolution of which may affect the availability of the spectrum in any given market. Second, the Commission makes no representations or guarantees regarding the accuracy or completeness

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those that did not formally request the waiver, that wish to avail themselves of the waiver); American Family Association, *Letter*, 19 FCC Rcd 18681 (Sept. 22, 2004) (granting waiver of Section 1.2105(b)(2) of the Commission's rules for the petitioners and other similarly situated applicants because the circumstances unique to Auction 37 compel grant of the requested waiver as being in the public interest).

<sup>82</sup> McElroy Informal Objection at 7. WWC argues that it seeks waiver of Section 22.949(b)(3) of the Commission's rules because "it did not know, and could not reasonably have known, prior to filing its application that station KNKR315 was operational." Waiver Request at 2-3.

<sup>83</sup> McElroy Informal Objection at 7-8; McElroy Informal Reply at 5-6. In response to WWC's statement in its Opposition that McElroy "does not assert that it was able to determine the status [of Station KNKR315] through publicly available information that WWC could have accessed," WWC Opposition at 5, McElroy simply reiterates that "McElroy's success conclusively proves that WWC's failure is no basis for a waiver," McElroy Informal Reply at 6.

<sup>84</sup> McElroy Informal Objection at 7.

<sup>85</sup> McElroy Informal Reply at 6. The "inconsistent information" to which McElroy refers in the ULS database is that SBI filed its Phase II modification application several weeks after the "cancellation date" of August 7, 1998. *Id.* While McElroy boasts that "confronting exactly the same facts," it "undertook additional research and was able to timely submit a fully compliant amendment." *Id.* We note, however, that confronted with the same facts, McElroy also submitted a completely defective application in the first place and only corrected its defects after publicly filing that application.

<sup>86</sup> McElroy Informal Reply at 6-7.

<sup>87</sup> McElroy Informal Reply at 7.

<sup>88</sup> McElroy Informal Reply at 7.

of information in its databases, including the accuracy or completeness of information that incumbent licensees have provided. The public notices are intended to seek out information from the public to correct errors in the Commission databases and to assist potential bidders in taking steps that might help them determine the actual value of the white space in the market in which they are bidding. Importantly, the Commission issues subsequent due diligence public notices to update information regarding both filings and corrections to database information as that information becomes available before the auction. We find no reason, and McElroy provides none, to mandate that suggestions intended to assist potential bidders in the context of competitive bidding be used as a pre-condition to eligibility as an applicant in this proceeding.

31. Finally, we reject McElroy's argument that the public notice accepting its Quemado application for filing established a new cut-off deadline for WWC to amend the similar defects in its application.<sup>89</sup> According to McElroy, "[a]ll interested parties were given notice of Station KNKR315's operational status on July 17, [2002] when the Public Notice accepting McElroy's re-filed Quemado cell as a separate application was released."<sup>90</sup> McElroy concludes that WWC was "clearly able" to amend its application within the 30 days of that public notice, but that WWC "never bothers to justify" amending its application beyond that 30-day period."<sup>91</sup> McElroy's argument is not only legally unfounded, but seemingly at odds with its opposition to SBI's Quemado application. No Commission rule obligated WWC to meet a 30-day deadline based on the public notice accepting McElroy's Quemado application for filing. In fact, the Commission has clearly stated that the acceptance of a later application during a notice and cut-off period does not establish a later cut-off period.<sup>92</sup> Staff sent WWC the letter dated July 25, 2002, directing WWC to amend its application to "demonstrate interference-free operation" at SBI's Datil site licensed as Station KNKR315. The letter granted WWC sixty days within which to submit its amendment. WWC filed its amendment and corresponding waiver request 20 days before that deadline. WWC therefore filed the requested information in a timely manner. Significantly, McElroy fails to explain why the 30-day period following the release of the public notice accepting its Quemado application for filing should apply to WWC's amended Quemado site, but not to SBI's separately filed Quemado application. We therefore deny McElroy's Informal Objection. We further grant WWC's request for waiver of Section 22.949(b)(3) of the Commission's rules, and accept for filing WWC's amended application filed on September 5, 2002, which includes two separate CGSAs.

32. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(d), and Sections 0.331 and 1.939 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.939, the Petition to Deny filed by McElroy Electronics Corporation on September 20, 2002, and the Petition to Deny filed by WWC License L.L.C. on September 20, 2002, are GRANTED.

33. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.934(a) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.934(a), the Application, File Number 0000997158, filed by Smith Bagley, Inc. on August 14, 2002, is DISMISSED.

34. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 303(r), and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(d), and Sections 0.331 and

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<sup>89</sup> McElroy Informal Objection at 5 and 8; McElroy Informal Reply at 8.

<sup>90</sup> McElroy Informal Objection at 8.

<sup>91</sup> McElroy Informal Objection at 8; McElroy Informal Reply at 8.

<sup>92</sup> King Communications, Inc., *Memorandum Opinion and Order on Reconsideration*, 1986 WL 291849 (FCC) (CCB June 11, 1986).

1.939 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.939, the Opposition filed by Smith Bagley, Inc. on October 3, 2002, is DISMISSED to the extent described herein.

35. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.41 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.41, the request filed by McElroy Electronic Corporation on September 25, 2002, to accept its Petition to Dismiss or Deny as an Informal Objection, is GRANTED.

36. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.41 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.41, the Informal Objection filed by McElroy Electronic Corporation on September 25, 2002, is DENIED.

37. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, the Request for Waiver filed by WWC License L.L.C. on September 5, 2002, is GRANTED to the extent described herein.

38. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Sections 0.331 and 22.131 of the Commission's rules, 47 C.F.R. §§ 0.331, 22.131, the Mobility Division shall process Application File Nos. 0000913369 and 0000959846, filed by McElroy Electronics Corporation on June 4, 2002, and July 11, 2002, respectively; File No. 0000922001, filed by Commnet Wireless, LLC on June 12, 2002; File No. 0000959430, filed by ALLTELL Communications of the Southwest Limited Partnership on July 11, 2002; File No. 0000960815 filed by Smith Bagley, Inc. on July 12, 2002; and File No. 0000959496 filed by WWC License L.L.C., as amended on September 5, 2002, in accordance with Commission rules.

FEDERAL COMMUNICATIONS COMMISSION

Cyndi Thomas  
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