BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CASE NO. 04-1174

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I2WAY CORPORATION,

*Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA

*Respondents*

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ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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## GLOSSARY

This brief does not contain any arcane abbreviations or acronyms.

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

***Parties and Amici***

All parties, intervenors, and *amici* appearing before the agency and in this Court are listed in the brief of the petitioner i2way Corporation.

***Rulings under review***

*In the Matter of i2way Request for Declaratory Rules Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules*, 18 FCC Rcd 6293 (Wireless Bureau 2003) (J.A. 43), *review denied,* 19 FCC Rcd 8460 (2004) (J.A. 57).

***Related cases***

This case has not previously been before this Court. There are not related cases in this or any other court.

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BRIEF FOR RESPONDENTS

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## JURISDICTION

This Court has jurisdiction pursuant to 47 U.S.C. § 402(a).

## STATUTES AND REGULATIONS

The pertinent regulation, 47 C.F.R. § 90.187, is appended to this brief.

## STATEMENT OF ISSUES PRESENTED

Section 90.187(e) of the Federal Communications Commission's rules provides that no more than 10 channels for a trunked mobile radio operation may be applied for in a single application; additional channels may be applied for in a subsequent application, according to the rule, but only if all the previously authorized trunked channels have been placed into operation. In the order on review, the Commission interpreted this rule as limiting an applicant to filing for no more than 10 channels in a single service area at a given time and rejected i2way's proposed interpretation whereby an applicant could file an unlimited number of applications in a single service area provided that each application covers 10 channels or less and specifies a unique transmitter site. The issues thus presented are:

1. Whether the FCC reasonably interpreted its rule.
2. Whether i2way had adequate notice of the requirements of the rule.

## COUNTERSTATEMENT

Petitioner i2way asked the FCC to issue a declaratory order that 47 C.F.R. § 90.187(e) places no limit on the number of mobile radio service applications that can be filed even within the same service area, provided that no single application seeks more than 10 channels and the applications specify different transmitter sites. The Commission rejected i2way's interpretation of the rule. Relying on both the language and history of Rule 90.187(e), the Commission held that the rule provides that if an applicant proposes in two separate applications to provide service to the same area, the second application must include a certification that all the channels

authorized pursuant to the first application have been placed into operation. *In the Matter of i2way Request for Declaratory Rules Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules*, 18 FCC Rcd 6293 (Wireless Bureau 2003) (J.A. 43), *review denied*, 19 FCC Rcd 8460 (2004) (J.A. 57). In this proceeding, i2way challenges the Commission's interpretation of its own rule.

### A. Regulatory background

Rule 90.187(e) governs applications to provide trunked operations in types of private land mobile radio services known as the Industrial/Business Radio Pool and the Public Safety Pool. A "trunked" system has multiple channels and contains an electronic capability that automatically searches for an open channel. The Industrial/Business Radio Pool supports day-to-day business activities such as dispatching vehicles and monitoring and controlling remote equipment. The Public Safety Radio Pool covers the communications needs of a variety of state and local governmental activities such as police and fire services, medical rescue, disaster relief, and school bus service.[1]

Before 1999, there was no limit on the number of trunked channels in the relevant services for which an entity might apply in one application. In the omnibus mobile radio rulemaking that led to the adoption of 47 C.F.R. § 90.187(e), however, industry commenters persuaded the Commission of the need to limit

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[1] A description of the Industrial/Business Radio Pool and the Public Safety Radio Pool can be found at the FCC's web site. *See* http://wireless.fcc.gov/services/ind&bus and http://wireless.fcc.gov/publicsafety/psppool.

service applications to prevent "warehousing," whereby an applicant could "inhibit effective use of the spectrum by obtaining authorizations for trunked channels that would not be immediately used."[2]

Consistent with the industry consensus, the Commission therefore adopted a new rule – codified in Rule 90.187(e) – "that the maximum number of channels that may initially be requested for any given trunked system is ten." *Ibid.* The Commission stated that the limit would not preclude an applicant from requesting additional channels in subsequent applications. "However," the Commission continued, "consideration of such subsequent applications would be dependent upon a certification from the applicant that the channels for which it is then authorized have been constructed and placed into operation." *Id.* at 10930-10931.

The Commission made an exception for public safety entities because they often construct complex communications systems that "may require more than 10 channels at a single location." The Commission allowed public safety users to apply for more than 10 channels provided that such applications are accompanied by a showing of "sufficient need" as defined in the rule. *Id.* at 10931.

Implementing these determinations, 47 C.F.R. § 90.187(e) states in relevant part:

> No more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single application. Subsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification . . . that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation. . . . Applicants in the Public

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[2] *Third Memorandum Opinion and Order*, 14 FCC Rcd 10922, 10930 (1999).

> Safety Pool may request more than 10 channels at a single location provided that any application for more than 10 Public Safety channels must be accompanied by a showing of sufficient need.[3]

### B. i2way's request for declaratory ruling

In 2000 and 2001, i2way filed more than 300 applications around the country to provide service on the frequencies assigned to the Industrial/Business Radio Pool and hence subject to 47 C.F.R. § 90.187(e). The Commission dismissed some of those applications pursuant to the rule because i2way had licensed 10-channel stations at different sites in the same service areas proposed in the dismissed applications, and i2way had failed to attest that all the channels authorized to it in those areas had been placed into operation. The Commission returned some other applications because i2way had other 10-channel applications pending at the Commission that proposed to serve the same areas as specified in the returned applications. The Commission told i2way that multiple applications for the same service area are not permitted under the rule because the applicant cannot certify that the operations specified in the first application have been placed into operation.[4]

i2way then sought a declaratory ruling from the Commission "to seek clarification regarding whether the ten-channel limit contained in Section

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[3] The rule goes on to state that the showing of "sufficient need" may be satisfied by submission of loading studies demonstrating that the requested channels in excess of 10 will be loaded with 50 mobiles per channel within a five year period commencing with the grant of the application. 47 C.F.R. § 90.187(e).

[4] *See* "Request for Declaratory Ruling," filed by i2way on June 4, 2002, at pages 2-3 (J.A. 10-11).

[90.]187(e) of the Commission's rules compels the return or dismissal of applications in situations where a single applicant has filed multiple applications, each requesting 10 channels, for different sites within the same general service area." *Id.* at pages 1-2 (J.A. 9-10).

In its request, i2way contended that its applications should not have been returned or dismissed. According to i2way, the rule establishes only that no more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single application. "The applications," i2way said, "complied with that specific requirement: The applications were limited to ten channels." *Id.* at page 4 (J.A. 12). To the extent that the Commission was reading the rule to limit subsequent applications for sites in the same geographic area, i2way continued, "those additional requirements are unsupported by rule and are contrary to fundamental principles of administrative law." *Id.* at pages 4-5 (J.A. 12-13).

To support its contention, i2way noted that the restriction on subsequent applications was adopted in 1999, when trunked systems were licensed either exclusively to a single entity or with the concurrence of co-channel licensees. It was thus possible at that time, i2way suggested, to inhibit the effective use of the spectrum by accumulating trunked channels that would not be immediately used. *Id.* at page 6 (J.A.14). But then in 2000, i2way continued, the Commission incorporated into its rules "the concept of decentralized trunking on shared spectrum." *Ibid.* A "shared" operation is one in which the licensee does not enjoy the exclusive use of the assigned frequency but must instead cooperate with other

users of that frequency.[5] Because many of its applications that were rejected by the Commission proposed to operate on shared spectrum, i2way contended that the 10-channel limit should not be applied to those applications because "a licensee [on shared spectrum] is powerless to 'warehouse' the assigned spectrum [or to] 'inhibit effective use of the spectrum.'" *Id.* at pages 6-7 (J.A. 14-15).

Finally, i2way argued that the Commission's interpretation of the rule amounted to the promulgation of a new rule that was adopted without the requisite notice and comment and that i2way did not have clear notice of the standard that would be employed as the basis for dismissing or returning its applications. *Id.* at pages 7-8 (J.A. 15-16).

Upon receipt of the request for declaratory ruling, the Commission issued a public notice soliciting comment on the request.[6] Every commenter that responded to the notice disagreed with i2way's reading of the rule. For instance, the Land Mobile Communications Council ("LMCC") – a "non-profit association of organizations representing virtually all users of land mobile radio systems, providers of land mobile services, and manufacturers of land mobile radio equipment – endorsed the Commission's construction of Rule 90.187(e) as "properly balanc[ing] the threat of spectrum 'warehousing' with the benefits of flexibility and efficiency in the [public land mobile radio] shared spectrum

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[5] Frequencies in the land mobile radio service are now generally available only on a shared basis. 47 C.F.R. § 90.173(a). Certain frequencies in this service are available for the exclusive use of the licensee, but those exceptions to the shared-use policy are not relevant here.

[6] "Public Notice," DA 02-1827, dated July 29, 2002 (J.A. 19).

bands."[7] LMCC added "that without consistent application of the Section 90.187(e) channel limitation, utilization of these bands by conventional and trunked licensees alike could be severely compromised." *Id.* at page 4 (J.A. 33).

Similarly, the Industrial Telecommunications Association ("ITA"), a Commission-certified frequency advisory committee whose members include more than 3,500 licensed land mobile radio communication users and many trade associations, stated that i2way's interpretation of the rule is "contrary to the Commission's goal of spectrum efficiency."[8] ITA asserted that i2way's applications for additional channels could hinder the development of centralized trunking throughout the country by preventing other users from having the opportunity to operate efficiently. *Id.* at page 4 (J.A. 27).

Motorola, Inc., agreed with both LMCC and ITA, and concluded: "The intent and language of the 10-channel rule is clear and there is no need for the FCC to issue additional clarification."[9]

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[7] Comments of The Land Mobile Communications Council," dated September 12, 2002, at pages 1, 4 (J.A. 30, 33).

[8] "Comments of Industrial Telecommunications, Association, Inc." filed August 28, 2002, at pages 2, 4 (J.A. 25, 27).

[9] "Reply Comments of Motorola, Inc.," filed September 12, 2002, at pages 1, 2, 3 ((J.A. 36, 37, 38). In addition, a number of permissible *ex parte* filings warned that i2way's proposal could overload shared channels with far-reaching adverse consequences on important services such as water supply and alarm systems. *See In the Matter of i2way Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules,* 18 FCC Rcd 6293 (Wireless Bureau 2003) at note 31 (J.A. 48).

### C. The Commission's staff decision

The Policy and Rules Branch of the Commission's Wireless Telecommunications Bureau denied i2way's request for declaratory ruling. *In the Matter of i2way Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules,* 18 FCC Rcd 6293 (Wireless Bureau 2003) (J.A. 43) ("*Branch Order*"), *review denied,* 19 FCC Rcd 8460 (2004) (J.A. 57).

First of all, the Branch said, i2way's declaratory ruling request focuses solely on the first sentence of Section 90.187(e), which limits to 10 the number of channels permitted in a single application, and ignores the part of the rule that describes the circumstances under which a licensee may apply for more than 10 channels. That latter part of the rule makes clear, the Branch said, that a licensee must construct its maximum of 10 authorized channels before submitting an application for additional channels. *Branch Order* at ¶ 5 (J.A. 46).

The Branch rejected i2way's claim that the rule is ambiguous because, although the fourth sentence of the rule does specifically refer to a limitation of "10 channels at a specific location," it does not expressly define the area relevant to the 10-channel limit. On the contrary, the Branch said, the reference to a service area is inherent in the Commission's process of licensing trunked systems on a site-specific basis. Parties file single applications in which they designate specific coordinates for locating the transmitter, individual licenses are granted at those single locations, and the Commission's rules delineate specific service contours for the approved transmitter, the Branch explained. Thus, the Branch continued, the

licensee must determine the service area around the single location for which it is licensed, and the 10-channel limit of Section 90.187(e) applies to that service area. *Branch Order* at ¶ 6 & n.22 (J.A. 46).

Next, the Branch observed that i2way's view of the rule that merely limits the number of channels permitted on a single transmitter site, rather than in a service area, would vitiate the 10-channel limitation. "Under i2way's interpretation," the Branch said, "there is no distinction, for example, between five applications seeking authority to operate ten channels each, and one application seeking authority to operate fifty channels in any given service area." *Branch Order* at ¶ 7 (J.A. 47).

The Branch then dismissed i2way's argument that the 10-channel limitation does not apply to its applications for decentralized trunked systems that operate on shared spectrum. The argument was based on i2way's observation that when the limitation was adopted in 1999, trunked systems using the subject frequencies were not licensed on a shared basis. (See pages 6-7 above.) The Branch noted that in July 2000, when the Commission revised the definition of trunked systems to include all trunked systems, including decentralized operations, the Commission stated that all trunked systems are subject to Section 90.187. *Branch Order* at ¶ 8, *citing Part 90 Biennial Review Report & Order*, 15 FCC Rcd 16673 at ¶¶ 22-26 (2000) (J.A. 47). "Because the rule applies to all trunked systems, including decentralized operation in the Industrial/Business Radio Pool, it is also clear that Section 90.187(e) applies to shared spectrum," the Branch concluded. *Id.* at ¶ 8 (J.A. 47).

Furthermore, the Branch added, it is significant that the Commission did not modify Section 90.187 to limit application of the 10-channel rule to centralized systems operating on an exclusive basis when it revised the definition of trunked systems. Therefore, the Branch continued, i2way's argument that the 10-channel limit does not apply to decentralized trunked systems "is effectively a late-filed petition for reconsideration of a Commission order that was released over two years ago." *Branch Order* at ¶ 8 (J.A. 47-48).

Finally, the Branch dismissed i2way's complaint that the Commission's interpretation will not afford i2way sufficient spectrum to accommodate successfully the deployment of its proposed system. That private concern is irrelevant to any consideration of how to interpret the rule, the Branch said, and it noted that i2way had neither sought a waiver of the rule nor did it provide any information to justify a grant of a waiver. *Id.* at ¶ 9 (J.A. 48).

### D. The Commission decision on review

On i2way's application for review of the Branch decision, the Commission affirmed the decision. *In the Matter of i2way Request for Declaratory Ruling Regarding the Ten-Channel Limit of Section 90.187(e) of the Commission's Rules*, 19 FCC Rcd 8460 (2004) (J.A. 57) ("*Commission Order*")

The Commission agreed with the Branch that the rule's application to a particular service area is inherent in the Commission's licensing process. "[T]he license designates specific coordinates for locating a transmitter and our rules delineate the area contours within which the licensee is authorized to provide its

service," the Commission said. *Commission Order* at ¶ 6 (J.A. 60). Likewise, the Commission found support for that view in the rule's reference to the 10-channel limit "at a single location" for Public Safety Pool applications. "[A] single application to provide service on ten channels at a site-specific location is a request to provide service on those channels within a service area defined by our rules based on the transmitter location," the Commission explained. *Ibid.*

The Commission also agreed that a requirement limiting the number of channels permitted on a single transmitter, rather than in a service area, would vitiate the purpose of the rule, "which is to prevent spectrum warehousing and promote spectrum efficiency in this shared channel environment." *Commission Order* at ¶¶ 7, 8 (J.A. 60-61). As an example, the Commission said, if i2way were right, "there would be nothing to prevent an applicant from filing an application at one site and another application a few hundred feet away, thereby extending the original service area without ever constructing any facilities or placing any channels into operation. Under i2way's argument, an applicant could simultaneously file several applications that could encumber large amounts of spectrum over vast areas without ever constructing any licensed channels." *Commission Order* at ¶ 7 (J.A. 60-61). "An interpretation of a rule that disregards essential elements of that rule cannot be deemed reasonable," the Commission declared. *Id.* at ¶ 8 (J.A. 61).

Finally, the Commission agreed with its staff that i2way's private concern for its business plans "is irrelevant to any consideration of how we interpret Commission rules." *Id.* at ¶ 9 (J.A. 61). The Commission noted in that regard that

i2way had neither sought a waiver of the rule nor did it provide any information sufficient to justify a grant of a waiver. *Ibid.*

## SUMMARY OF ARGUMENT

47 C.F.R. § 90.187(e) states that "[n]o more than 10 channels for trunked operation [in the relevant service] may be applied for in a single application" and that "[s]ubsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification . . . that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation." This language was adopted by the Commission to prevent "warehousing" by applicants who could otherwise obtain valuable authorizations for trunked channels that would not be immediately used.[10] The Commission's interpretation of the rule, whereby the limitation applies to the service area of the first application and not just to the transmitter site of the first application, is consistent with this language and administrative history.

i2way's interpretation of the rule, on the other hand, would permit the 10-channel limitation to be circumvented by the filing of applications for multiple transmitter sites within the same service area. As the Commission explained in the decision below, an interpretation that is at odds with the fundamental intent of the rule, and not compelled by the language of the rule, cannot be deemed reasonable.

i2way claims that even if the Commission's interpretation is reasonable, it may not be applied to i2way because i2way did not have advance notice of that

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[10] *See Third Memorandum Opinion and Order, supra,* 14 FCC Rcd at 10930.

interpretation. First of all, i2way should have known what the rule required, given the language and history of the rule and given the patent unacceptability of its contrary interpretation. Furthermore, even if i2way did not know when it filed its applications that the limitation on subsequent applications applies to the service area of the first application and not just to the same transmitter site, i2way knows now. This is not a "cut-off" case in which the Commission established a filing window that is now closed. Thus, i2way does not need relief from this Court to cure the alleged defect in notice, because i2way can simply refile in compliance with the rule.

## STANDARD OF REVIEW

As to whether the Commission's interpretation of its own licensing regulation (47 C.F.R. § 90.187) was permissible, the Court gives "controlling weight" to the Commission's interpretation "unless it is plainly erroneous or inconsistent with the regulation." *High Plains Wireless, L.P. v. FCC,* 276 F.3d 599, 606 (D.C. Cir. 2002), *quoting Capital Network Sys., Inc. v. FCC,* 28 F.3d 201, 206 (D.C. Cir. 1994). Indeed, the Court reviews an agency's construction of its own rules under a standard even "more deferential . . . than afforded under [*Chevron USA Inc. v. NRDC,* 467 U.S. 837 (1984)]." *Omnipoint Corp. v. FCC,* 78 F.3d 620, 631 (D.C. Cir. 1996), *quoting National Med. Enterprises v. Shalala,* 43 F.3d 691, 697 (D.C. Cir. 1995).

As to whether the licensing rule's limitation on subsequent applications was reasonably clear at the time i2way filed its applications, the limitation was required

to be "reasonably comprehensible to men acting in good faith." *Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968). It was not necessary that the rule make "the clearest possible articulation" of the limitation, but that based on a fair reading of the rule, the petitioner "knew or should have known" what the rule required. *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1358 (D.C. Cir. 1993).

## ARGUMENT

### THE FCC'S INTERPRETATION OF 47 C.F.R. § 90.187(e) COMPORTS WITH THE LETTER AND INTENT OF THE RULE, AND i2WAY KNEW OR SHOULD HAVE KNOWN WHAT THE RULE REQUIRED.

i2way Corporation argues (1) that the Commission's interpretation of 47 C.F.R. § 90.187(e) – that the limitation on subsequent applications applies to those that propose to serve the same area as the first application and not just to those on the same transmitter site – is inconsistent with the terms of the rule, Petitioner's Brief at 8-10; and (2) that i2way did not have notice of the Commission's interpretation when it tendered its applications and relied to its detriment on its own reasonable but contrary interpretation of the rule. Petitioner's Brief at 9-10, 12-13.

#### 1. The Commission's interpretation is consistent with the text and history of the rule, while i2way's interpretation undermines the purpose of the rule.

First and foremost, the Commission's interpretation of its own rule is entitled to judicial deference where, as here, the interpretation is consistent with

the terms and intent of the rule.[11] The text of the rule states: "No more than 10 channels for trunked operation [in the relevant service] may be applied for in a single application" and that "[s]ubsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification . . . that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation." This language was adopted by the Commission to prevent "warehousing" by applicants who could otherwise obtain valuable authorizations for trunked channels that would not be immediately used.[12] In furtherance of that goal, as the Commission explained in the rulemaking that adopted Section 90.187(e), "consideration of . . . subsequent applications would be dependent upon a certification from the applicant that the channels for which it is then authorized have been constructed and placed into operation." *Id.* at 10930-31.

Moreover, the area-specific reference of the limitation is plainly set forth in the rule's reference to the 10-channel limit "at a single location" for Public Safety Pool applications. As the Commission observed below: "[A] single application to provide service on ten channels at a site-specific location is a request to provide service on those channels within a service area defined by our rules based on the transmitter location." *Commission Order* at ¶ 6 (J.A. 60).

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[11] *High Plains Wireless, L.P. v. FCC, supra,* 276 F.3d at 606; *quoting Capital Network Sys., Inc. v. FCC, supra,* 28 F.3d at 206; *Omnipoint Corp. v. FCC, supra,* 78 F.3d at 631, *quoting National Med. Enterprises v. Shalala, supra,* 43 F.3d at 697.

[12] *See Third Memorandum Opinion and Order, supra,* 14 FCC Rcd at 10930.

The Commission's interpretation of the rule, whereby the limitation applies to the service area of the first application and not just to the transmitter site of the first application, is consistent with this language and legislative history. In contrast to this consistent and reasonable agency interpretation, i2way's interpretation would vitiate the rule. By its terms, and as explained in the *Third Memorandum Opinion and Order, supra*, the rule seeks to avoid warehousing of unused spectrum by limiting licensees to 10 channels at a time. Once those 10 channels have been placed into operation, the licensee can request 10 additional channels, and so on as needed, provided that the previously authorized channels in an overlapping service area continue to be used. The Commission is thus assured by operation of the rule that all authorized mobile radio channels in a service area will actually be used. If the limitation on subsequent applications applied only to the precise same transmitter site as the original application, as urged by i2way, nothing would prevent an applicant from filing an application at one site and another application at another site a short distance away, and so on and so on, thereby extending the originally proposed service area and encumbering large amounts of valuable spectrum over vast areas without ever placing its previously licensed channels into operation. *See Commission Order* at ¶ 7 (J.A. 60-61).

i2way does not appear to dispute that the rule prohibits the filing of only one application to operate 50 channels in a given service area. Yet, there is no meaningful distinction between an application of this type and five applications for the same service area, each proposing to operate 10 channels, which i2way argues here is permissible. *See Branch Order* at ¶ 7 (J.A. 47). As the Commission

correctly declared, "An interpretation of a rule that disregards essential elements of that rule cannot be deemed reasonable." *Id.* at ¶ 8 (J.A. 61).

**2. Because i2way can refile its applications, provided they comply with the rule, i2way's argument that it did not have notice of the Commission's interpretation of the rule before i2way filed its applications is largely irrelevant.**

Besides challenging the reasonableness of the Commission's interpretation, i2way argues that it did not know of the Commission's interpretation when it filed its applications, and that it relied on its own equally plausible interpretation of the rule. According to i2way, in the absence of notice of the Commission's interpretation, it was entitled to rely on its own reasonable interpretation and have its applications processed even if the Commission's interpretation were ultimately to be seen by the Court as reasonable.

Dispositive of much that argument is the fact that this is not a "cut-off" case in which the Commission established a filing window that is now closed. Unlike the cases on which i2way principally relies for its claim that it had a due process right to adequate notice of the rule's requirements, the return or dismissal of i2way's applications has not caused i2way to miss a critical deadline for filing. The return or dismissal of the applications did not cost i2way the irretrievable right to participate in a lottery[13] or a comparative hearing as in the cited cases,[14] nor does i2way claim that the filing of its applications was time-critical or even time-

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[13] *Compare Satellite Broadcasting Co., Inc. v. FCC,* 824 F.2d 1 (D.C. Cir. 1987); *Maxcell Telecom Plus, Inc. v. FCC,* 815 F.2d 1551 (D.C. Cir. 1987).

[14] *Compare Radio Athens, Inc., (WATH) v. FCC,* 401 F.2d 398 (D.C. Cir. 1968).

sensitive.[15] On the contrary, i2way can refile at any time so long as it complies with the rule. In *McElroy Electronics*, the Court suggested that where the applications were dismissed without prejudice, a reasonable response might be: "Big deal. They can just refile." *McElroy Electronics Corp. v. FCC, supra,* 900 F.2d at 1358. That response seems appropriate here.[16]

The cut-off cases upon which i2way relies are additionally distinguishable because in those cases, the judicial finding of lack of adequate notice was based on confusing and inconsistent pronouncements made previously by the Commission concerning the proper time and/or place for filing the applications. *See McElroy Electronics Corp. v. FCC, supra,* 990 F.2d at 1355, 1363; *Satellite Broadcasting Co. v. FCC, supra,* 824 F.2d at 2-3; *Maxcell Telecom Plus, Inc. v. FCC, supra,* 815 F.2d at 1560. Here, by contrast, the Commission has never suggested by word or deed that i2way's interpretation of Section 90.187(e) would be acceptable, and the Commission is unaware of any mobile radio applicant – and there have been

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[15] *Compare McElroy Electronics Corp. v. FCC,* 900 F.2d 1351, 1358 (D.C. Cir. 1993).

[16] Because i2way can simply refile its applications, i2way lacks standing to make the argument that if the Commission's interpretation of 47 C.F.R. § 90.198(e) was correct, the case should nevertheless be remanded on notice grounds. In that situation, the Court's remand order would provide i2way nothing more than the opportunity it already has to apply for additional licenses under the Commission's interpretation of the rule. *See, e.g., Allen v. Wright,* 468 U.S. 737, 751 (1984); *California Ass'n of the Physically Handicapped, Inc. v. FCC,* 778 F.2d 823, 825 (D.C. Cir. 1985) (To establish standing, the alleged injury must be capable of being redressed by the Court). To the extent i2way seeks more than a right to file under the rule as it has been interpreted by the Commission and asks for a grant of multiple 10-channel applications, each serving the same area, with no requirement for the grants to be preceded by any construction, i2way is asking for a windfall to which it is not entitled.

hundreds subject to the rule – that has ever asked the FCC to interpret the rule as i2way now purports to do.

Finally, even if i2way is right that Section 90.187(e) did not provide "the clearest possible articulation" that subsequent applications are limited within the same service area as the first application, *see* Petitioner's Brief at 9, such perfect articulation is not required. *See McElroy Electronics Corp. v. FCC*, 990 F2d at 1358. Rather, the line of cases on which i2way relies would require at most that the service-area reference in Section 90.187(e) must be "reasonably comprehensible to men acting in good faith" and must be sufficiently clear that i2way "should have known" what the rule required. *Id.; Radio Athens, Inc. (WATH) v. FCC*, *supra*, 401 F.2 at 404. That standard is satisfied in this case, given that i2way knew (or should have known) that trunked systems are licensed on a site-specific basis to serve specifically delineated contours, *see Branch Order* at ¶ 6 (J.A. 46), that the rule was designed to prevent warehousing within those service areas, that the rule limits applications in the Public Safety Pool to 10 channels "at a single location," and that i2way's proffered interpretation would undermine the rule's purpose.[17]

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[17] It is not clear whether i2way attempts to preserve the argument that it made below that the rule should not apply to its applications to operate on shared spectrum because the threat of warehousing allegedly does not exist in such applications. See page 6 above. In any event, that argument would be relevant only to a request for a waiver of the rule's 10-channel limitation and not to an analysis of what the rule says. Plainly, as the Commission declared, the rule encompasses all applications to provide trunked operations, whether shared or not. See page 12 above. Indeed, as the industry commenters observed, wasteful grants of applications for shared spectrum can burden and overload that spectrum and thus impede the Commission's goal of spectrum efficiency. See pages 8-9 above.

## CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Respectfully submitted,

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December 8, 2004

IN THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

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|---|---|---|
| I2WAY CORPORATION<br><br>PETITIONER<br><br>V.<br><br>FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA | ) | CASE NO. 04-1174 |

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 5327 words.

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December 8, 2004

# STATUTORY APPENDIX

Contents:

**CODE OF FEDERAL REGULATIONS**
**TITLE 47--TELECOMMUNICATION**
**CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION**
**SUBCHAPTER D--SAFETY AND SPECIAL RADIO SERVICES**
**PART 90--PRIVATE LAND MOBILE RADIO SERVICES**
**SUBPART H--POLICIES GOVERNING THE ASSIGNMENT OF FREQUENCIES**

Current through November 17, 2004; 69 FR 67499

§ 90.187 Trunking in the bands between 150 and 512 MHz.

(a) Applicants for trunked systems operating on frequencies between 150 and 512 MHz (except 220-222 MHz) must indicate on their applications (class of station code, instructions for FCC Form 601) that their system will be trunked. Licensees of stations that are not trunked, may trunk their systems only after modifying their license (see § 1.927 of this chapter).

(b) Trunked systems operating under this section must employ equipment that prevents transmission on a trunked frequency if a signal from another system is present on that frequency. The level of monitoring must be sufficient to avoid causing harmful interference to other systems. However, this monitoring requirement does not apply if the conditions in paragraph (b)(1) or (b)(2) of this section, are met:

(1) Where applicants for or licensees operating in the 470-512 MHz band meet the loading requirements of § 90.313 and have exclusive use of their frequencies in their service area.

(2) On frequencies where an applicant or licensee does not have an exclusive service area provided that all frequency coordination requirements are complied with and written consent is obtained from affected licensees using either the procedure set forth in paragraphs (b)(2)(i) and (b)(2)(ii) of this section (mileage separation) or the procedure set forth in paragraph (b)(2)(iii) of this section (protected contours).

(i) Affected licensees for the purposes of this section are licensees of stations that have assigned frequencies (base and mobile) that are 15 kHz or less removed from proposed stations that will operate with a 25 kHz channel bandwidth; stations that have assigned frequencies (base and mobile) that are 7.5 kHz or less removed from proposed stations that will operate with a 12.5 kHz bandwidth; or stations that have assigned frequencies (base and mobile) 3.75 kHz or less removed from proposed stations that will operate with a 6.25 kHz bandwidth.

(ii) Where such stations' service areas (37 dBu contour for stations in the 150-174 MHz band and 39 dBu contour for stations in the 421-512 MHz bands; see § 90.205) overlap a circle with radius 113 km (70 mi.) from the proposed base station.

(iii) In lieu of the mileage separation procedure set forth in paragraphs (b)(2)(i) and (b)(2)(ii) of this section, applicants for trunked facilities may obtain consent only from stations that would be subjected to objectionable interference from the trunked facilities. Objectionable interference will be considered to exist when the interference contour (19 dBu for VHF stations, 21 dBu for UHF stations) of a proposed trunked station would intersect the service contour (37 dBu for VHF stations, 39 dBu for UHF stations) of an existing station. The existing stations that must be considered in a contour overlap analysis are a function of the channel bandwidth of the proposed trunked station, as follows:

(A) For trunked stations proposing 25 kHz channel bandwidth: Existing co-channel stations and existing stations that have an operating frequency 15 kHz or less from the proposed trunked station.

(B) For trunked stations proposing 12.5 kHz channel bandwidth: Existing co-channel stations and existing stations that have an operating frequency 7.5 kHz or less from the proposed trunked station.

(C) For trunked stations proposing 6.25 kHz channel bandwidth: Existing co-channel stations and existing stations that have an operating frequency 3.75 kHz or less from the proposed trunked station.

(iv) The calculation of service and interference contours referenced in paragraph (b)(2)(iii) of this section shall be

done using generally accepted engineering practices and standards which, for purposes of this section, shall presumptively be the practices and standards agreed to by a consensus of all certified frequency coordinators.

(v) The written consent from the licensees specified in paragraphs (b)(2)(i) and (b)(2)(ii) or (b)(2)(iii)(A), (b)(2)(iii)(B) and (b)(2)(iii)(C) of this section shall specifically state all terms agreed to by the parties and shall be signed by the parties. The written consent shall be maintained by the operator of the trunked station and be made available to the Commission upon request. The submission of a coordinated trunked application to the Commission shall include a certification from the applicant that written consent has been obtained from all licensees specified in paragraphs (b)(2)(i) and (b)(2)(ii) or (b)(2)(iii)(A), (b)(2)(iii)(B) and (b)(2)(iii)(C) of this section that the written consent documents encompass the complete understandings and agreements of the parties as to such consent; and that the terms and conditions thereof are consistent with the Commission's rules. Should a potential applicant disagree with a certified frequency coordinator's determination that objectionable interference exists with respect to a given channel or channels, that potential applicant may request the Commission to overturn the certified frequency coordinator's determination. In that event, the burden of proving by clear and convincing evidence that the certified frequency coordinator's determination is incorrect shall rest with the potential applicant. If a licensee has consented to the use of trunking, but later decides against the use of trunking, that licensee may request that the licensee(s) of the trunked system(s) cease the use of trunking. Should the trunked station(s) decline the licensee's request, the licensee may request a replacement channel from the Commission. A new applicant whose interference contour overlaps the service contour of a trunked licensee will be assigned the same channel as the trunked licensee only if the trunked licensee consents in writing and a copy of the written consent is submitted to the certified frequency coordinator responsible for coordination of the application.

(c) Trunking of systems licensed on paging-only channels or licensed in the Radiolocation Service (subpart F) is not permitted.

(d) Potential applicants proposing trunked operation may file written notice with any certified frequency coordinator for the pool (Public Safety or Industrial/Business) in which the applicant proposes to operate. The notice shall specify the channels on which the potential trunked applicant proposes to operate and the proposed effective radiated power, antenna pattern, height above ground, height above average terrain and proposed channel bandwidth. On receipt of such a notice, the certified frequency coordinator shall notify all other certified frequency coordinators in the relevant pool within one business day. For a period of sixty days thereafter, no application will be accepted for coordination which specifies parameters that would result in objectionable interference to the channels specified in the notice. Potential applicants shall not file another notice for the same channels within 10 km (6.2 miles) of the same location unless six months shall have elapsed since the filing of the last such notice. Certified frequency coordinators shall return without action, any coordination request which violates the terms of this paragraph (d).

(e) No more than 10 channels for trunked operation in the Industrial/Business Pool may be applied for in a single application. Subsequent applications, limited to an additional 10 channels or fewer, must be accompanied by a certification, submitted to the certified frequency coordinator coordinating the application, that all of the applicant's existing channels authorized for trunked operation have been constructed and placed in operation. Certified frequency coordinators are authorized to require documentation in support of the applicant's certification that existing channels have been constructed and placed in operation. Applicants in the Public Safety Pool may request more than 10 channels at a single location provided that any application for more than 10 Public Safety Pool channels must be accompanied by a showing of sufficient need. The requirement for such a showing may be satisfied by submission of loading studies demonstrating that requested channels in excess of 10 will be loaded with 50 mobiles per channel within a five year period commencing with grant of the application.

(f) If a licensee authorized for trunked operation discontinues trunked operation for a period of 30 consecutive days, the licensee, within 7 days of the expiration of said 30 day period, shall file a conforming application for modification of license with the Commission. Upon grant of that application, new applicants may file for the same channel or channels notwithstanding the interference contour of the new applicant's proposed channel or channels overlaps the service contour of the station that was previously engaged in trunked operation.