

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

In the Matter of)	
)	
Certain Cellular Rural Service Area)	Fee Nos. 9179072, et al.
Applications)	Fee Nos. 9187479, et al.
)	
Certain Cellular Rural Service Area)	Fee Nos. 9177648, et al.
Applications in Market Nos. 599A and 672A)	
)	
Applications of Great Western Cellular)	File No. 10269CLP88
Partners, L.L.C., Monroe Telephone)	File No. 10625CLP89
Services, L.L.C., and FutureWave Partners,)	File No. 10810CLP89
L.L.C.)	

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2002

Released: May 9, 2002

By the Commission:

I. INTRODUCTION

1. The Commission has before it an application for review filed by Hightower Communications, Inc. (Hightower) and a petition for reconsideration filed by Ranger Cellular and Miller Communications, Inc. (collectively, Ranger/Miller), both of which challenge the dismissal by the Wireless Telecommunications Bureau (Bureau) of their cellular lottery applications in eight rural service area (RSA) markets.¹ Also before the Commission is a

¹ See Application for Review, filed April 2, 2001, by Hightower (Hightower Application); Petition for Reconsideration, filed April 2, 2001, by Ranger/Miller (Ranger/Miller Petition). The RSA markets are: 332A - Polk, Arkansas; 370A - Monroe, Florida; 492A - Goodhue, Minnesota; 582A - Barnes, North Dakota; 599A - Nowata, Oklahoma; 615A - Bradford, Pennsylvania; 672A - Chambers, Texas; and 727A - Ceiba, Puerto Rico. Hightower does not seek review of the Bureau's dismissal of all pending applications for RSA No. 599A - Nowata, Oklahoma.

On April 25, 2002, Hightower filed a pleading captioned "Amendment to Application for Review" (Amendment). Section 1.115(d) requires that an "application for review and any supplemental thereto shall be filed within 30 days of public notice of [the] action . . ." 47 C.F.R. § 1.115(d). The order, DA 01-544, that is the subject of both Hightower's Application for Review and its Amendment was released on March 2, 2001. Accordingly, any application for review of that order was due within 30 days (continued....)

separate application for review filed by Ranger/Miller challenging the Bureau's subsequent award of cellular licenses to other applicants in three of the eight RSA markets pursuant to legislation passed by Congress.² For the reasons stated below, we deny both applications for review and the petition for reconsideration.

II. BACKGROUND

2. In 1984, the Commission adopted rules to award cellular licenses by lottery.³ By 1991, the Commission had held lotteries for all of the cellular RSA markets, and licenses were awarded to the lottery winners in most instances. In the RSA markets at issue here, however, the initial lottery winner was disqualified from receiving the license because of a successful petition to deny or other Commission action, and the license was not awarded to those initial lottery winners.

3. Under these circumstances, our former cellular lottery policy provided that after the application of the tentative selectee was denied, a second lottery would be held among the remaining applicants or, in cases where multiple rank-ordered applicants were selected in the first lottery, the next ranked applicant would become the tentative selectee.⁴ Accordingly, in 1992, the Commission conducted a second lottery in two of the markets at issue (RSA No. 599A - Nowata, Oklahoma, and RSA No. 672A - Chambers, Texas),⁵ and in July 1996, the

(Continued from previous page)

of March 2, 2001, or April 2, 2001. *See* 47 C.F.R. 1.4(b)(2) (the release date is the public notice date for non-rulemaking documents). Hightower did not seek leave to file its Amendment, which is more than one-year delinquent, nor did it request waiver of the section 1.115(d) 30-day filing requirement. Accordingly, we dismiss the Amendment, and its contents shall not be considered part of the record in this proceeding. We note, however, that nothing in the amendment alters the conclusions reached in this Memorandum Opinion and Order.

² *See* Application for Review, filed November 1, 2001, by Ranger/Miller (Ranger/Miller Application).

³ Amendment of the Commission's Rules to Allow the Selection from Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C.2d 175 (1984) (subsequent history omitted).

⁴ Former rule section 1.823(a) provided, in pertinent part, that "[t]he random selection shall pick a tentative selectee and then repeat the random selection process with the remaining applicants, so that, in the event that the tentative selectee's application is denied, the other applicants will be ranked in order as alternative selectees." 47 C.F.R. § 1.823(a) (1987). The foregoing provision was removed in May 1988 and replaced by a provision which authorized the Common Carrier Bureau Chief to designate the number of additional applicants, if any, to be selected as rank-ordered tentative selectees on a case-by-case basis. *See* former rule section 1.823(a), 47 C.F.R. § 1.823(a) (1989).

⁵ *Public Notice*, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner Was Defective," Mimeo No. 21449 (Jan. 29, 1992) (multiple RSA markets); *In Re Application Of Progressive Cellular III B-3 for Facilities in the Domestic Public* (continued....)

Commission scheduled a second lottery for the six remaining markets.⁶ On September 9, 1996, however, Cellular Communications of Puerto Rico (CCPR) filed a petition requesting that the Commission use auctions rather than a lottery to award the six licenses scheduled for the 1996 lottery.⁷ To preserve the issue raised in CCPR's petition, the Bureau postponed the lottery until further notice.⁸

4. On August 5, 1997, the Balanced Budget Act of 1997 was signed into law.⁹ Section 3002(a)(2)(B) of this legislation, codified in Section 309(i)(5) of the Communications Act, terminated the Commission's authority to use lotteries to select among mutually exclusive applications for initial licenses or construction permits after July 1, 1997, except for licenses for noncommercial educational and public broadcast stations.¹⁰ Pursuant to this provision, in April 1999, the Bureau dismissed all pending cellular lottery applications for the RSA markets at issue in this proceeding.¹¹ Several lottery applicants, including Hightower and Ranger/Miller, sought reconsideration of the Bureau's decision. Subsequently, the Bureau reinstated the applications of the tentative selectees in RSA No. 599A - Nowata, Oklahoma and RSA No. 672A - Chambers,

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Cellular Radio Telecommunications Service on Frequency Block A in Market No. 599, Oklahoma 4—Nowata, *Memorandum Opinion and Order*, 7 FCC Rcd 2080 (CCB, MSD 1992) (denying petition to stay relottery of RSA No. 599).

⁶ *Public Notice*, "FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective," Mimeo No. 63896 (July 12, 1996) (RSA Market Nos. 332A, 370A, 492A, 582A, 615A and 727A).

⁷ Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking, RM-8897 (filed Sept. 9, 1996).

⁸ *Public Notice*, "Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas," Mimeo No. 65051 (Sept. 10, 1996).

⁹ Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997) (amending 47 U.S.C. § 309(j)) (1997 Budget Act).

¹⁰ In the Omnibus Budget Reconciliation Act of 1993, Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction. Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993) (1993 Budget Act). Section 6002(e) of the 1993 Budget Act prohibited the FCC from "issu[ing] any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993." *Id.*, § 6002(e). This provision afforded the Commission discretion whether to use auctions or lotteries for applications filed *before* July 26, 1993.

¹¹ *See* In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (WTB 1999) (dismissing all pending applications in RSA Market Nos. 332A, 370A, 492A, 582A, 615A, and 727A); In the Matter of Certain Cellular Rural Service Area Applications in Markets 599A and 672A, *Order*, DA 99-814 (WTB, CWD rel. April 29, 1999) (*Dismissal Order II*) (dismissing all pending applications in RSA Market Nos. 599A and 672A).

Texas, the two markets in which a second lottery had been held in 1992.¹² In RSA No. 599A, the tentative selectee, Zephyr Tele-Link (Zephyr), was awarded the license.¹³ In RSA No. 672A, the application of the tentative selectee, Alee Cellular Communications (Alee), was dismissed for lack of character qualification based on a prior disqualification in another cellular application proceeding.¹⁴ With respect to all other cellular lottery applicants, the Bureau issued an order in March 2001 denying the outstanding petitions for reconsideration and upholding prior dismissal of all pending lottery applications.¹⁵ Hightower and Ranger/Miller now seek review of the Bureau's reconsideration decision.

5. On December 31, 2000, Congress enacted the Launching Our Communities' Access to Local Television Act of 2000 (2000 Act).¹⁶ Section 1007 of the 2000 Act directed the Commission to reinstate and process the applications of the original lottery winners in three of the eight RSA markets, No. 370A - Monroe, Florida, No. 492A - Goodhue, Minnesota, and No. 615A - Bradford, Pennsylvania (collectively, the "2000 Act Markets").¹⁷ The three applicants, Monroe Telephone Services, L.L.C., Great Western Cellular Partners, L.L.C., and FutureWave Partners, L.L.C. (collectively, the "2000 Act Applicants"), won their respective lotteries in 1989 and 1990, but were disqualified by the Commission in 1992 because their foreign ownership exceeded the then-applicable statutory and regulatory limits.¹⁸ Pursuant to the statutory

¹² See In the Matter of Rural Cellular Service Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426, 1999 WESTLAW 511242 (FEDCOM-FCC) (WTB rel. July 21, 1999).

¹³ In the Matter of Zephyr Tele-Link Application for a Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service To Serve the Oklahoma 4 - Nowata Rural Service Area, Market No. 599A, *Order*, 15 FCC Rcd 4247 (WTB, CWD 2000) (*Zephyr Order*).

¹⁴ See In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831 (WTB, CWD 2000). On reconsideration, we recently reinstated the application and designated the matter for hearing on the issue of whether Alee's prior disqualification in the New Mexico RSA 3 Market 55A also disqualifies it for the Texas 21 license. In the Matter of Application of Alee Cellular Communications for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672A, *Memorandum Opinion and Order, Hearing Designation Order and Notice of Opportunity for Hearing*, FCC 02-36, 2002 WESTLAW 252755 (FEDCOM-FCC) (rel. Feb. 22, 2002).

¹⁵ In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4860 (WTB 2001) (*Bureau RSA Dismissal Order*).

¹⁶ District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000), Title X.

¹⁷ *Id.*, § 1007(a)(1).

¹⁸ In re Applications of Cellwave Telephone Services L.P., FutureWave General Partners L.P., and Great Western Cellular Partners, *Memorandum Opinion and Order*, 7 FCC Rcd 5955 (1992), *recon. by Great Western denied*, Great Western Cellular Partners, *Memorandum Opinion and Order*, 8 FCC Rcd (continued....)

directive, the 2000 Act Applicants filed amended applications for their respective markets on February 9, 2001. On March 16, 2001, the Commercial Wireless Division (Division) found each applicant “technically, financially, and otherwise qualified to be a Commission licensee,” and awarded the licenses for the 2000 Act Markets.¹⁹ Ranger/Miller sought reconsideration of that decision, which the Division denied in October 2001.²⁰ Ranger/Miller seek review of the Division’s reconsideration order in their application for review.²¹

6. On January 31, 2001, the Commission, acting pursuant to the 1997 Budget Act, released a *Notice of Proposed Rulemaking* proposing auction rules for the four remaining RSA markets other than the 2000 Act Markets and the market awarded to Zephyr.²² In the *RSA Auction Report and Order*, released on January 28, 2002, the Commission adopted rules to auction these licenses.²³ The rules provide that all eligible entities, including the original lottery applicants for these markets, may participate in the auction.²⁴

III. DISCUSSION

A. Ranger/Miller Petition for Reconsideration

7. We first address the Ranger/Miller Petition for Reconsideration, which challenges the Bureau’s decision to dismiss pending lottery applications in the eight markets at issue. Ranger/Miller argue that in those markets in which the Bureau dismissed all lottery applications and subsequently reinstated a tentative selectee (*i.e.*, the three 2000 Act Markets and RSA Nos. 599A and 672A), it should have reinstated all of the dismissed pending applications as well.²⁵

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3222 (1993). The D.C. Circuit upheld dismissal of these applications. *See Cellwave Tel. Servs. L.P. v FCC*, 30 F.3d 1533 (1994); *Great Western Cellular Partners v. FCC*, 72 F.3d 919 (D.C. Cir. 1995) (*per curium*) (unpublished table disposition).

¹⁹ *Public Notice*, “Wireless Telecommunications Bureau Grants Rural Cellular Licenses,” 16 FCC Rcd 5601 (WTB, CWD rel. Mar. 16, 2001).

²⁰ In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and FutureWave Partners, L.L.C., *Memorandum Opinion and Order*, 16 FCC Rcd 18,767 (WTB, CWD rel. Oct. 19, 2001) (*Great Western Order*).

²¹ Great Western, Monroe, and FutureWave filed an Opposition to the Ranger/Miller Application on November 16, 2001. Ranger/Miller filed a Reply on November 28, 2001.

²² Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Notice of Proposed Rulemaking*, Docket No. 01-32, 16 FCC Rcd 4296 (2001).

²³ Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Report and Order*, Docket No. 01-32, FCC 02-9, 2002 WESTLAW 100245 (FEDCOM-FCC) (rel. Jan. 28, 2002) (*RSA Auction Report and Order*), *pet. for review pending*, Ranger Cellular, et al. v. FCC, No. 02-1093 (D.C. Cir., filed Mar. 18, 2002).

²⁴ *Id.* at ¶10.

²⁵ Ranger/Miller Petition at 16-17.

We concur with the Bureau's determination, in the order below, that reinstatement of the 2000 Act Applicants did not require the reinstatement of all competing lottery applications in these three markets.²⁶ First, the 2000 Act required reinstatement of only the 2000 Act Applicants.²⁷ Second, if any of the 2000 Act Applicants were found ineligible after amending their applications, the 2000 Act directed the Commission to auction the affected license.²⁸ Moreover, because the 1997 Budget Act terminated the Commission's authority to use lotteries to select among mutually exclusive applications for initial licenses after July 1, 1997, the Commission was precluded from conducting a second lottery among the original lottery applicants for these markets. Under these circumstances, reinstatement of competing lottery applications in the 2000 Act Markets would have served no purpose. We also reject Ranger/Miller's claim that the Bureau's reinstatement of the 2000 Act Applicants' applications without concurrent reinstatement of the other lottery applications demonstrates that the Bureau "pre-judged" the merits of the reinstated applications.²⁹ We find that the Bureau objectively reviewed and approved the technical, financial and other qualifications of each of the 2000 Act Applicants, none of which are challenged by Ranger/Miller.

8. We similarly reject Ranger/Miller's contention that the Bureau should have reinstated all pending applications for RSA No. 599A – Nowata, Oklahoma, the market awarded to Zephyr Tele-Link.³⁰ In this market, after initially dismissing pending applications,³¹ the Bureau determined that it had overlooked the fact that a second lottery had been held for this market in 1992, in which Zephyr was the tentative selectee.³² Accordingly, the Bureau reinstated and ultimately granted Zephyr's application. Ranger/Miller argue that the award of the license to Zephyr violates Section 309(i)(5) of the Act, which prohibits the use of lotteries to award licenses after July 1, 1997. This misconstrues the effect of the statute on the Commission's licensing authority: Section 309(i)(5) only prevents the Commission from conducting new lotteries after July 1, 1997 (with limited exceptions not applicable here), it does

²⁶ See *Great Western Order*, 16 FCC Rcd at 18769 ¶ 7.

²⁷ *Id.* at n.12 (citing 2000 Act, § 1007(a)).

²⁸ 2000 Act at § 1007(B)(5).

²⁹ Ranger/Miller Petition at 16.

³⁰ *Id.* at 17-18. We note that Ranger/Miller did not seek reconsideration of the order granting Zephyr's application for RSA No. 599A, and that its raising of issues concerning that market in this proceeding amounts to little more than a late-filed petition for reconsideration of the order granting the authorization. Ranger/Miller have offered no justification for the Commission to consider these late-filed arguments, other than its claim that it was "unfortunately unaware" of the license grant. *Id.* at 18. Although we exercise our discretion to address Ranger/Miller's arguments concerning RSA No. 599A, we find the timing of this challenge to provide separate grounds for dismissal of this portion of Ranger/Miller's petition.

³¹ See *Dismissal Order II*, *supra* n.11.

³² See *Zephyr Order*, *supra* n.13.

not prohibit the Commission from processing an application based on the results of a lottery that occurred prior to that date.³³

9. Finally, Ranger/Miller contend that reinstatement of all pending applications in the three 2000 Act Markets and RSA Nos. 599A and 672A is required by the D.C. Circuit's opinions in *Bachow Communications v. FCC* and *McElroy Electronics v. FCC*.³⁴ *Bachow* holds that where the FCC replaces an obsolete license processing system with another system, the FCC is not obliged to process all pending applications just because applicants that would have been cut-off by the old system can apply under the new system.³⁵ *McElroy* stands for the proposition that when the Commission decides to process timely-filed applications, it may not also process competing applications that were filed out of time.³⁶ The *Bachow* and *McElroy* holdings have no relevance to the circumstances presented here, because the Commission did not process any applications that were filed out of time, but merely reinstated the timely-filed applications of prior lottery winners.

10. Ranger/Miller also argue that the Bureau erred in dismissing pending applications in the four RSA markets that remain subject to future auction, on the grounds that only the original pool of lottery applicants should be eligible to participate in such auctions. Ranger/Miller argue that: (1) limiting participation in RSA auctions to pre-1997 filers is required by the 1997 Budget Act; (2) the auction applicant pool should be so limited on grounds of equity; and (3) the Bureau's decision to dismiss pending applications was based on improper consideration of revenue enhancement as the basis for establishing auction rules.³⁷ Ranger/Miller raised these same arguments concerning the scope of the applicant pool for RSA auctions in the *RSA Auction* proceeding, and we rejected each of these arguments in the *RSA Auction Report and Order*.³⁸ Therefore, we need not address these arguments further here.

B. Hightower Application for Review

11. Hightower claims that the original lottery applicants for the RSAs at issue in this proceeding³⁹ are parties to implied-in-fact contracts with the Commission, which require the

³³ Ranger/Miller's argument is equally inapposite with respect to RSA No. 672A, although the application of the tentative selectee in that case, Alee Communications, was not granted and is currently designated for hearing. See n.14, *supra*.

³⁴ Ranger/Miller Petition at 16 (citing *Bachow Communications, Inc., et al. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001); *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996)).

³⁵ *Bachow*, 237 F.3d at 687.

³⁶ *McElroy*, 86 F.3d at 248.

³⁷ Ranger/Miller Petition at 7-15.

³⁸ *RSA Auction Report and Order* at ¶¶16-21.

³⁹ Hightower does not seek review of the dismissal of pending applications for RSA No. 599A.

Commission to award licenses for these RSAs solely by lottery.⁴⁰ Hightower asserts that the Bureau's dismissal of all applications in these RSAs without having conducted rielotteries constitutes a repudiation of these implied-in-fact contracts. Hightower further asserts that a complete breach of contract occurred when the Bureau awarded the licenses for the 2000 Act Markets,⁴¹ and that upon auction of the remaining RSA markets, the Commission will be in similar complete breach as to the former lottery applicants for those markets.⁴² Hightower claims that these alleged breaches entitle the original RSA lottery applicants to money damages, and requests that the Commission award these applicants \$24.3 million (the alleged aggregate fair market value of the 2000 Act Markets) plus the proceeds of future RSA auctions.⁴³ The Bureau rejected Hightower's contract theory on reconsideration in the *Bureau RSA Dismissal Order*.⁴⁴ We conclude that the Bureau correctly dismissed these claims.

12. First, we find that the Commission lacks jurisdiction to entertain Hightower's claim for money damages. Indeed, Hightower concedes that "the issues [presented in its Application for Review] are within the exclusive jurisdiction of the United States Court of Federal Claims,"⁴⁵ and fails to cite any precedent supporting Commission jurisdiction, but merely states that it is raising these claims before the Commission out of an abundance of caution.⁴⁶ We agree with Hightower's conclusion that the Commission does not have jurisdiction over claims for money damages, and are unaware of any case, statute, or rule authorizing the Commission to award money damages. This alone provides sufficient basis for dismissal of Hightower's claim.⁴⁷

13. Even assuming *arguendo* that the Commission had jurisdiction to address Hightower's claim, we also agree with the Bureau's rejection of Hightower's contention that the

⁴⁰ Hightower Application at 11.

⁴¹ *Id.* at 13.

⁴² *Id.* at 17.

⁴³ *Id.* at 21.

⁴⁴ *Bureau RSA Dismissal Order*, 16 FCC Rcd. at 4862 ¶5 & n.12.

⁴⁵ Hightower Application at 1.

⁴⁶ On August 6, 2001, a class action complaint and a motion seeking class certification of all applicants for the seven RSAs (except the disqualified tentative selectees) were filed with the Claims Court. *Folden v. United States*, Case No. 01-456C. Folden's complaint includes the same arguments made by Hightower in this proceeding. On October 5, 2001, the United States filed a motion to dismiss Folden's complaint. On November 1, 2001, the court granted the United States' motion to stay consideration of plaintiffs' motion for class certification pending the United States' motion to dismiss. The court heard oral argument on that motion on January 24, 2002.

⁴⁷ To the extent that plaintiffs in the *Folden* case are taking issue with the regulatory decisions of the Commission, their arguments belong before the Commission and the federal courts of appeals.

Commission was contractually obligated to Hightower and other RSA applicants to award the RSA licenses by lottery.⁴⁸ The U.S. Court of Appeals for the D.C. Circuit has repeatedly held that the filing of an application with the FCC creates no vested rights in the applicant.⁴⁹ For example, in *Maxcell Telecom v. FCC*, the appellants, citing *Ashbacker Radio Corp. v. FCC*, argued that the Commission had deprived them of their "right to a comparative hearing" by switching to a lottery procedure open to new applicants.⁵⁰ The D.C. Circuit rejected the argument that an applicant possesses any right to a specific procedure for awarding a license, concluding that *Ashbacker* "found no such 'right,' but merely held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license."⁵¹ Similarly, in *Bachow v. FCC*, the court upheld the Commission's adoption of interim licensing procedures in the 39 GHz service during a transition from comparative hearings to competitive bidding rules, which permitted new applicants to file license applications following established cut-off dates for such licenses, thereby increasing the competition for licenses.⁵² The *Bachow* court similarly cited the Commission's authority to "make midstream rule adjustments, even though it disrupts expectations and alters the competitive balance among applicants."⁵³ Finally, in *PLMRS Narrowband v. FCC*, the D.C. Circuit found that an applicant who filed an application under lottery rules did not thereby obtain a "right" to processing by lottery.⁵⁴ We find that the change in Commission application procedures from awarding RSA licenses by lottery to awarding licenses by auction or pursuant to Congressional directive does not give rise to a claim for breach of contract.

14. Finally, we conclude that Hightower's implied-in-fact contract claim fails as a matter of government contract law. First, Hightower does not even allege that it entered into a

⁴⁸ *Bureau RSA Dismissal Order*, 16 FCC Rcd at 4862 ¶5 & n.12.

⁴⁹ *Bachow*, 237 F.3d at 687-88 (applicants for licenses had no "vested right" in enforcement of cut-off rules); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1000-01 (D.C. Cir. 1999); *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997). In *Chadmoore*, the D.C. Circuit held that the FCC's reliance upon a new regulation to deny Chadmoore's application for extended implementation authority for construction of a wide-area specialized mobile radio system was neither arbitrary nor capricious. The court stated that the Commission's action did not "impair[] a right possessed by [Chadmoore] because none vested on the filing of its application." *Id.* at 241.

⁵⁰ *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987).

⁵¹ *Id.* (citing *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984)).

⁵² *Bachow*, 237 F.3d at 687.

⁵³ *Id.* at 687-88 (citing *Maxcell*, 815 F.2d 155; and *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997)).

⁵⁴ *PLMRS*, 182 F.3d at 1000-01 (citing *Chadmoore*, 113 F.3d at 241; and *DIRECTV*, 110 F.3d at 825-26). See also *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 590 (D.C. Cir. 2001) (rejecting argument that FCC rule change constituted a breach of contract).

contract with “an agent of the United States with actual authority to bind the government in contract.”⁵⁵ Absent such a showing, Hightower cannot establish the existence of a contract with the United States.⁵⁶ Second, Hightower fails to demonstrate mutual consideration. As Hightower notes, the Commission charged lottery applicants a \$200 application fee, which merely allowed the Commission to recover its application processing costs.⁵⁷ Hightower thus provided no consideration to the FCC for any alleged contract.⁵⁸ Consideration for a Government contract “must render a benefit to the government, and not merely a detriment to the contractor.”⁵⁹ Because Hightower fails to allege that the Government obtained even a theoretical benefit from its license applications, its contract claim falls due to a failure of consideration. Third, Hightower fails to establish that by accepting lottery applications, the Commission intended to enter into binding contracts that would preclude the possibility of future rule changes that could modify the process by which licenses were awarded. Nothing in the lottery notices cited by Hightower indicates such an intent.

C. Ranger/Miller Application for Review

15. In their Application for Review, Ranger/Miller challenge the Division’s grant of licenses for the 2000 Act Markets on several grounds. First, Ranger/Miller argue that the 2000 Act violates the constitutional separation-of-powers doctrine because it overrules the final judgment of the D.C. Circuit affirming the Commission’s original disqualification of the 2000 Act Applicants.⁶⁰ In the order below, the Division declined to address this argument based on established precedent that the Commission cannot declare an act of Congress void.⁶¹ Ranger/Miller concede that “the Commission cannot itself declare an Act of Congress unconstitutional,” but nevertheless urge us to ignore the implementing provisions of the 2000

⁵⁵ *Blais v. United States*, 31 Fed. Cl. 422, 428 (1994).

⁵⁶ *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991). Hightower cites only state law lottery precedent to establish the existence of contracts. Hightower Application at 10-11 n.28 (citations omitted). However, none of those cases is apposite because the unique requirements of an implied-in-fact Federal contract -- namely the specific acts of a Federal official with authority to bind the United States and to obligate Federal funds to the alleged contract -- do not apply to non-Federal contracts.

⁵⁷ Hightower Application at 16.

⁵⁸ *Girling Health Sys., Inc. v. United States*, 949 F.2d 1145, 1147 (Fed. Cir. 1997), *cert. denied*, 503 U.S. 940 (1992) (citing *Somali Dev. Bank v. United States*, 508 F.2d 817, 822 (Ct. Cl. 1974)) (there can be no contract that binds the Government in the absence of consideration).

⁵⁹ *Montefiore Hosp. Ass’n of W. Pa. v. United States*, 5 Cl. Ct. 471, 476 (1984).

⁶⁰ Ranger/Miller Application at 4-6.

⁶¹ *Great Western Order*, 16 FCC Rcd at 18769-70, ¶5 & n.11 (citing *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987)).

Act.⁶² We reject this request because the Commission has no authority to disregard statutory requirements imposed on it by Congress.

16. Ranger/Miller next argue that granting licenses to the 2000 Act Applicants violated the statutory prohibition in Section 309(i)(5) of the Act against the use of lotteries to award licenses after July 1, 1997.⁶³ Ranger/Miller claim that these licenses were awarded “by lottery” in violation of the statute because the 2000 Act Applicants were prior lottery winners. We find no statutory conflict here. First, Section 309(i)(5) only prohibits the Commission from using lotteries to select from among mutually exclusive applicants; it does not limit the authority of Congress to enact legislation selecting particular applications (based on prior lottery results or any other factor) and directing the Commission to process them, as occurred in this case. Second, as we have noted above, the lotteries in which the 2000 Act Applicants participated occurred in 1989 and 1990, and Section 309(i)(5) does not apply to lotteries held prior to July 1, 1997.⁶⁴

17. Ranger/Miller also claim that the 2000 Act did not mandate grant of licenses to the 2000 Act Applicants, but that Congress “simply intended for [their applications] to be reinstated” so that they could participate in an auction with other applicants.⁶⁵ Ranger/Miller contend that to assume that Congress did not intend to auction the 2000 Act Markets is inconsistent with the auction provisions of Section 309(j) and would therefore violate the rule of statutory construction that statutes shall not be repealed by implication.⁶⁶ Again, Ranger/Miller’s attempt to demonstrate a conflict between the 2000 Act and the Communications Act is without merit. Section 309(j) authorizes the Commission to use auctions where the Commission is faced with mutually exclusive applications, but in this case, Congress designated a single applicant for each of the 2000 Act Markets and prohibited competing applications, so no mutual exclusivity could exist. Indeed, Section 1007(b)(5) of the 2000 Act specifically provided that the 2000 Act Markets would be open to new applications and auctions only if the Commission were to find any of the 2000 Act Applicants ineligible for a license grant or if any of the 2000 Act Applicants failed to satisfy certain service requirements, neither of which occurred in this case.⁶⁷ We therefore reject Ranger/Miller’s argument.

⁶² Ranger/Miller Application at 6.

⁶³ *Id.* at 7.

⁶⁴ *See* para. 8, *supra*.

⁶⁵ Ranger/Miller Application at 10.

⁶⁶ *Id.* at 10-11.

⁶⁷ 2000 Act, § 1007(b)(5).

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access to Local Television Act of 2000,⁶⁸ Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.106(b) of the Commission's rules, 47 C.F.R. § 1.106(b), the Petition for Reconsideration filed by Ranger Cellular and Miller Communications, Inc. on April 2, 2001, is hereby denied.

19. IT IS FURTHER ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access to Local Television Act of 2000,⁶⁹ Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Hightower Communications, Inc. on April 2, 2001, is hereby denied.

20. IT IS FURTHER ORDERED that, pursuant to Section 1007 of the Launching Our Communities' Access to Local Television Act of 2000,⁷⁰ Sections 4(i), 309(i)(5) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(i)(5), and 405, and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Ranger Cellular and Miller Communications, Inc. on November 1, 2001, is hereby denied.

21. IT IS FURTHER ORDERED that, pursuant to Section 1.115(d) of the Commission's rules, 47 C.F.R. § 1.115(d), the Amendment to Application for Review filed by Hightower Communications, Inc. on April 25, 2002, is hereby dismissed.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶⁸ District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762 (2000), Title X.

⁶⁹ *Id.*

⁷⁰ *Id.*