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

In the Matter of Applications of	)	
	)	
CHRISTINA DEL VALLE, New York, New York	)	FCC File No. 840002
	)	
ALBERTO E. GARZA, Los Angeles, California	)	FCC File No. 840004
	)	
IGNACIO SANTOS DE HOYOS, Boston, Massachusetts	)	FCC File No. 840009
	)	
LUZ LOBATON, Houston, Texas	)	FCC File No. 840017
	)	
For Licenses to Build and Operate 218-219 MHz Service Systems	)	

ORDER ON RECONSIDERATION

Adopted: October 22, 2001 **Released: October 24, 2001**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* We have before us a Petition for Reconsideration ("Petition") filed on April 5, 1996 by Jan M. Reed ("Reed") and Edward M. Johnson ("Johnson").[1] Reed and Johnson seek reconsideration of the denial[2] of their respective Applications for Review. Specifically, Reed and Johnson request recision of licenses granted to Christina del Valle, Alberto E. Ganza, Ignacio Santos de Hoyos, and Luz Lobaton and dismissal of all 218-219 MHz Service applications that are owned or controlled by aliens.[3] Finally, Reed and Johnson request the Commission to hold a new lottery for these licenses.[4] For the reasons discussed herein, we dismiss the Petition as repetitious.

2. *Background.* The 218-219 MHz Service was initially designated the "Interactive Video and Data Service" (IVDS).[5] The *1992 Allocation Report and Order* established the 218-219 MHz Service

[1] Jan M. Reed and Edward M. Johnson, Petition for Reconsideration (filed Apr. 5, 1996) (Petition). A Joint Opposition to the Petition for Reconsideration was filed on April 18, 1996. *See* Americom Network, Inc., American Interactive Network, Inc., AGS Telecom, Inc., and Amerilink Interactive Services, Inc., Joint Opposition to Petition for Reconsideration (filed Apr. 18, 1996) (Joint Opposition).

[2] Christina del Valle *et al.*, *Memorandum Opinion and Order*, 11 FCC Rcd 2948 (1996) (*MO&O*).

[3] *See* Petition at 13.

[4] *See id.* at 14. Subsequent to the filing of the Petition, the Communications Act was amended to deprive the Commission of authority to award licenses using a system of random selection (except for licenses for noncommercial educational broadcast stations) after July 1, 1997. *See* 47 U.S.C. § 309(i)(5). Accordingly, even if we considered the Petition on the merits, this request could not be granted.

[5] *See* Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, *Report and Order*, 7 FCC Rcd 1630 (1992) (*1992 Allocation Report and Order*). The 218-219 MHz (continued….)

with a 500 kilohertz frequency segment for two licenses in each of 734 cellular-defined service areas.[6] In the *1992 Allocation Report and Order*, we also concluded that, because of the personal nature of these communications and because they are offered on a subscription basis to individual members of the general public, the 218-219 MHz Service should be classified as a Private Radio Service.[7]

3. The subject licenses at issue were awarded via a lottery held on September 15, 1993 and were granted on March 28, 1994.[8] Although Reed and Johnson applied for such licenses and participated in the lottery, their applications were not granted.[9] Reed and Johnson also filed a number of actions challenging the Commission's authority to grant 218-219 MHz Service licenses to aliens.[10] In sum, Reed and Johnson contended that applicants of Mexican citizenship were ineligible to hold 218-219 MHz Service licenses.[11] Further, Reed and Johnson argued that 218-219 MHz Service licensees must be citizens of the United States.[12]

4. In 1994, the Licensing Division (Division), Private Radio Bureau, explicitly rejected the suggestion that United States citizenship was a prerequisite to holding a 218-219 MHz Service license.[13] On March 25, 1994, Reed and Johnson each filed an Application for Review of the Division's denial of their respective challenges to the grant of 218-219 MHz Service licenses to aliens. The Commission denied the Applications for Review on March 6, 1996. The Commission rejected the suggestion that Congress restricted aliens to operating only those radio stations that are ancillary to their businesses and precluded them from operating commercial radio stations.[14]

5. Specifically, the Commission concluded that Section 310 of the Communications Act of 1934, as amended, "is clear that Congress did not prohibit aliens, as a class, from obtaining licenses in the

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Service was established in response to a petition for rulemaking filed by TV Answer, Inc. (now known as EON Corporation), that proposed interactive capabilities for television viewers.

[6] *See, e.g., 1992 Allocation Report and Order*, 7 FCC Rcd at 1638-1640 ¶¶ 58-72.

[7] *See 1992 Allocation Report and Order*, 7 FCC Rcd at 1637-1638 ¶¶ 52-57.

[8] *See* Interactive Video and Data Service Licenses Granted, *Public Notice* (rel. Mar. 30, 1994). We awarded the first eighteen 218-219 MHz Service licenses (*i.e.*, two licenses in nine of the top 10 cellular-defined areas) via lottery, pursuant to the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (1993 Omnibus Budget Act), because the pertinent applications were accepted for filing by the Commission prior to July 26, 1993. *See* 1993 Omnibus Budget Act § 6002(e). The Commission subsequently issued the remaining 218-219 MHz Service licenses via competitive bidding.

[9] *See MO&O*, 11 FCC Rcd at 2948 ¶ 1.

[10] *See, e.g.,* Alberto E. Garza, *et al.*, *Order*, 9 FCC Rcd 1002 (1994) (*Johnson Order*) (discussing and denying two petitions filed by Johnson against 218-219 MHz Service applicants and licensees); Christina del Valle, *et al.*, *Order*, 9 FCC Rcd 1004 (1994) (*Reed Order*) (discussing and denying three petitions filed by Reed against 218-219 MHz Service applicants and licensees).

[11] *See Johnson Order*, 9 FCC Rcd at 1002 ¶¶ 4-5; *Reed Order*, 9 FCC Rcd at 1004 ¶¶ 3-8.

[12] *See Johnson Order*, 9 FCC Rcd at 1002 ¶¶ 4-5; *Reed Order*, 9 FCC Rcd at 1004 ¶¶ 3-8.

[13] *See, e.g., Johnson Order*, 9 FCC Rcd at 1002 ¶ 5; *Reed Order*, 9 FCC Rcd at 1004 ¶ 7.

[14] *See MO&O*, 11 FCC Rcd at 2949 ¶¶ 8-11.

IVDS service."[15] As such, the Commission explained that, "absent a specific directive from Congress that we consider the nationality of applicants for IVDS licenses under the public interest standard, we see no valid public interest justification for denying IVDS licenses to all foreign nationals [as aliens can be effective competitors in U.S. markets.]"[16] Reed and Johnson then filed the instant Petition seeking reconsideration of the Commission's decision.

6. *Discussion.* Section 1.106(b)(2) of the Commission's Rules[17] provides:

> Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

The staff may dismiss, as repetitious, a petition for reconsideration of an order denying an application for review that fails to rely on new facts or changed circumstances.[18] Reed and Johnson argue that "changed circumstances occurring subsequent to the Petitioners' last opportunity to present such matters" justify reconsideration of the Commission's decision.[19] Reed and Johnson claim that the "changed circumstances" consist of a Notice of Proposed Rulemaking released by the Commission in 1995.[20] According to Reed and Johnson, the proposed modification of Section 95.830 would have the effect of bringing IVDS squarely within the definition of a Commercial Mobile Radio Service and thereby preclude alien licensing of IVDS facilities because we regulate CMRS as common carrier. Thus, they contend that this proposal constitutes a changed circumstance.[21]

7. We disagree. Reed and Johnson incorrectly assume that the *Flexibility NPRM* is a changed circumstance[22] sufficient to warrant the Commission's reconsideration of this matter. A notice of

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[15] *Id.* at 2949 ¶ 9.

[16] *Id.* at 2949 ¶ 10.

[17] 47 C.F.R. § 1.106(b)(2).

[18] *See* 47 C.F.R. § 1.106(b)(3).

[19] Petition at 2. The Petition's reliance upon 47 C.F.R § 1.106(c)(2) in seeking reconsideration of the Commission's denial of their Applications for Review is grossly misplaced. *See* Petition at 2. Reed and Johnson misconstrue 47 C.F.R. § 1.106(c)(2) to provide "that to the extent that a petition for reconsideration **does not rely upon** new facts or newly discovered facts, it may nevertheless be granted, if consideration of such matters would serve the public interest." Petition at 2 (emphasis added). However, on its face, 47 C.F.R. § 1.106(c)(2) only applies to a petition for reconsideration "**which relies on facts not previously presented**. . . ." (emphasis added).

[20] *See* Petition at 12-13 (*citing* Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, *Notice of Proposed Rule Making*, 10 FCC Rcd 4981 (1995) (*Flexibility NPRM*)).

[21] *Id.*

[22] Moreover, the *Flexibility NPRM* was released on April 13, 1995, or almost one year before the Commission released the *MO&O* in this proceeding. If Reed and Johnson had believed that the *Flexibility NPRM* was (continued….)

proposed rulemaking is merely a proposal to change the Commission's Rules. It does not alter the legal rights of licensees or applicants.[23] Therefore, we find the Commission's release of the *Flexibility NPRM* cannot be considered a changed circumstance that would support a determination that consideration of Reed and Johnson's reconsideration petition is warranted under the circumstances presented.

8. We conclude that the remaining arguments raised by Reed and Johnson in the instant Petition were thoroughly considered and rejected by the Commission in the *MO&O*. We therefore dismiss the Petition as repetitious.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106(b)(3) of the Commission's Rules, 47 C.F.R. § 1.106(b)(3), the Petition for Reconsideration filed by Jan M. Reed and Edward M. Johnson on April 5, 1996 IS DISMISSED as repetitious.

10. This action is taken under delegated authority pursuant to Sections 0.131 and 1.106(b)(3) of the Commission's Rules, 47 C.F.R. §§ 0.131, 1.106(b)(3).

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

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significant to their argument, they both had the opportunity to present and should have presented those arguments in a supplement to their application for review. As a result, we believe that the Petition is also subject to dismissal because Reed and Johnson failed to present their arguments concerning the *Flexibility NPRM* in a timely manner. *See* Edens Broadcasting, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 4327 ¶ 8 (1991).

[23] *See Beaufort County Broadcasting Co. v. FCC*, 787 F.2d 645, 649 n.2 (D.C. Cir. 1986) (describing appellant's claim that it was entitled to the benefit of a policy proposed in a notice of proposed rulemaking as "frivolous").