

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

In the Matter of	)	
	)	
Sagir, Inc.	)	
Complainant,	)	
	)	
v.	)	File No. WB/ENF-F-95-014
	)	
	)	
N.E. Colorado Cellular, Inc.	)	
Defendant	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 3, 1997**

**Released: November 5, 1997**

By Chief, Enforcement and Consumer Information Division:

**I. INTRODUCTION**

1. We have before us a Petition For Partial Reconsideration ("Petition"), filed on March 5, 1997, by N.E. Colorado Cellular, Inc. ("NECC"). NECC requests reconsideration in part of the Memorandum Opinion and Order, issued in this proceeding by the Chief, Enforcement Division<sup>1</sup>, Wireless Telecommunications Bureau, pursuant to delegated authority. *Sagir Inc. v. N.E. Colorado Cellular, Inc.*, 12 FCC Rcd 1183 (MO&O, released February 3, 1997). The MO&O acted on a formal complaint filed by Sagir, Inc. ("Sagir") against NECC. Sagir and NECC are licensed to provide cellular radiotelephone services in adjacent Rural Service Areas ("RSAs"). In the MO&O we granted Sagir's complaint to the extent that we determined that NECC had violated Section 22.911(d) of the Commission's Rules by its delay in removing an unauthorized Service Area Boundary ("SAB") extension from Sagir's Cellular Geographic Service Area ("CGSA"), after it was requested by Sagir to do so. However, we further concluded that Sagir had failed to prove by a preponderance of the evidence that it incurred damages resulting from NECC's violation of the Rules, and we denied Sagir's complaint to the extent that it therein sought an award of damages.

<sup>1</sup> The Division's name subsequently was changed to "Enforcement and Consumer Information Division."

2. In its instant Petition, NECC requests the Division to reconsider its determination that NECC had violated the Commission's Rules and to render a determination that NECC was in compliance with the Commission's Rules. Sagir, on March 18, 1997, filed an Opposition<sup>2</sup> to NECC's Petition and NECC filed a Reply thereto on March 28, 1997. Upon consideration of these pleadings, we conclude that MO&O had correctly determined that NECC had violated Section 22.911(d) of the Commission's Rules. Accordingly, we deny NECC's Petition.

## II. BACKGROUND

3. Sagir is the cellular radiotelephone licensee in the Nebraska 1 - Sioux RSA, Market No. 533A, and NECC is the licensee in the adjacent Colorado 2 - Logan RSA, Market No. 349A. On May 8, 1992, NECC added a new cell to its system, cell #4, at Ovid, Colorado, with a *de minimis* SAB extension into a portion of the adjacent Nebraska 1 RSA, which at that time had not yet been covered by Sagir's system. On August 5, 1994, Sagir filed an FCC Form 489 notification with the Commission that it had constructed a cell at Chappell, Nebraska, with a SAB which overlapped NECC's Ovid site extension into Sagir's market.<sup>3</sup>

4. Thereafter, the parties entered into negotiations attempting to reach a mutual contour extension agreement, which would equalize signal strength from each of their systems at the borders shared by both companies.<sup>4</sup> After initial negotiations, Sagir, by October 19, 1994 at the latest, unequivocally requested NECC to withdraw its Ovid cell extension from its CGSA. Sagir also filed an informal complaint against NECC with the Commission on that date and another informal complaint, subsequently on November 11, 1994, in which it requested the Commission to order NECC to withdraw its extension. However, these actions did not terminate the negotiations between the parties, who continued their attempts to reach a mutual extension agreement.<sup>5</sup> While the parties were still negotiating, on October 20, 1994, Sagir filed an FCC Form 401 application, requesting authority to implement modifications at its Chappell site, which

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<sup>2</sup> In its Reply, NECC contends that Sagir lacks standing to oppose its Petition and that by filing its Opposition Sagir has abused the Commission's process. NECC requests the Commission to impose sanctions upon Sagir to discourage the filing of this kind of pleading, "which wastes FCC resources." In this regard, NECC argues that, because the MO&O denied Sagir's claim for damages, it "is no longer a party to this proceeding and therefore has no standing to file an Opposition."

We reject NECC's argument. Sagir is the complainant in this proceeding. Although, as NECC argues, it has been finally determined that NECC will not be required to pay damages to Sagir, neither NECC nor Sagir has lost its status as a party to this proceeding. Accordingly, we believe that, just as NECC has a right to request reconsideration of determinations in the MO&O, with which it disagrees, Sagir has a right to oppose reconsideration and reversal of those determinations.

<sup>3</sup> MO&O at ¶ 2.

<sup>4</sup> MO&O at ¶ 3.

<sup>5</sup> MO&O at ¶ 4.

were essentially the same as those which it had previously proposed in negotiations with NECC and which had been rejected by NECC. After it had been granted several extensions of time by the Commercial Wireless Division, to facilitate continued negotiation of a mutual extension agreement, NECC filed a petition to deny with respect to Sagir's application.<sup>6</sup>

5. NECC believed, based on its engineering analysis, that it could not withdraw the unauthorized SAB extension by merely reducing power at its Ovid cell without an "unacceptable" loss of its system's signal to a significant part of its service area. NECC determined that major modifications of its Ovid cell would be required, including a complete change in the antenna system and the use of a combination of three directional antennae, in order for it to maintain any significant service in its own market. NECC believed that Sagir was aware of these circumstances and that Sagir was also aware that once NECC made these costly changes, NECC would no longer have an incentive to enter into mutual extension agreement with Sagir. Nevertheless, Sagir continued its negotiations with NECC and at no time in the negotiating sessions between the parties, did Sagir demand that NECC's contour be removed before negotiations could continue.<sup>7</sup>

6. Finally, after NECC had concluded that a mutual extension agreement would not be reached, in January 1995, it began the process of redesigning its Ovid site to remove the extension from Sagir's market. Although it initially announced that it would complete the modifications by March 31, 1995, it experienced delays in the delivery of equipment, and construction was further delayed by heavy rains. The modifications were finally completed and placed in service on June 6, 1995,<sup>8</sup> at which time its SAB extension was finally removed from Sagir's CGSA.<sup>9</sup>

7. In the MO&O, we held that NECC, by its failure to remove its SAB from Sagir's CGSA promptly after it was requested by Sagir to do so on October 19, 1994, had violated Section 22.911(d) of the Commission's Rules.<sup>10</sup> This section, among other things, specifies the protections accorded to cellular licensees against capture of subscriber traffic within their CGSAs by adjacent systems on the same channel. Specifically, in cases such as this, where an SAB of

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<sup>6</sup> MO&O at ¶ 5.

<sup>7</sup> MO&O at ¶ 6.

<sup>8</sup> MO&O at ¶ 7.

<sup>9</sup> MO&O at ¶ 8.

<sup>10</sup> MO&O, ¶ 18.

one carrier overlaps the CGSA of an adjacent carrier and that carrier has requested its removal, Section 22.911(d)(2)(i) provides that:

In the event such request is made, the licensee of the overlapping system must reduce the transmitting power or antenna height (or both) at the pertinent cell site as necessary to remove the SAB from the CGSA of the other system, unless a written consent from the licensee of the other system allowing the SAB to remain is obtained.

8. NECC argued, as it does in its instant petition for partial reconsideration, that Sagir, by its course of conduct in continuing negotiations toward a mutual extension agreement, had impliedly given its consent to allowing the overlapping SAB to remain pending conclusion of the negotiations, and that it was, under the circumstances, reasonable and consistent with the Commission's policy of encouraging cooperation among cellular licensees, for it not to remove the SAB extension until after the negotiations between it and Sagir had concluded.<sup>11</sup> Nevertheless, we held in the MO&O that NECC was not justified by these circumstances in refusing to remove its SAB extension from Sagir's CGSA, in light of the unambiguous language of Section 22.911(d)(2)(i) of the Commission's Rules.<sup>12</sup>

### III. ANALYSIS

9. In its petition for partial reconsideration, NECC for the most part repeats arguments that were previously advanced by it, and were considered and rejected in the MO&O. In this regard, it argues that Sagir by its course of conduct had consented to a continuation of NECC SAB extension on its CGSA during the course of negotiations between the parties for a mutual extension agreement.<sup>13</sup> However, as we held in the MO&O, Section 22.911(d)(2)(i) requires that the SAB must be removed "unless a written consent from the licensee of the other system allowing the SAB to remain is obtained." Accordingly, even if Sagir's conduct in continuing negotiations with NECC could reasonably be interpreted as implying its consent to the continuation of the SAB extension, in spite of Sagir's repeated and explicit requests to NECC that it remove its SAB extension,<sup>14</sup> this would not be sufficient basis to excuse NECC from removing the SAB extension. The rule unambiguously requires the encroaching licensee to remove its SAB extension, unless a "written consent" by the licensee of the adjacent system is obtained. The rule does not permit the SAB extension to be continued, based on the consent of the other licensee, which, NECC argues, was implied by Sagir's course of conduct.

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<sup>11</sup> MO&O, ¶¶ 15 and 16.

<sup>12</sup> MO&O, ¶¶ 15 and 16.

<sup>13</sup> Petition, pp 4-6.

<sup>14</sup> See Sagir's Opposition, ¶¶ 8 and 9, Exhibits B and C.

10. NECC in this context points out that there was written correspondence between the parties in connection with the mutual extension negotiations, which it argues meets any requirement under the rules for a consent in writing. In particular, it refers to a letter agreement of December 22, 1994, in which the parties agreed to conduct drive test in connection with these negotiations to measure the emissions from the NECC cell whose SAB extended into Sagir's CGSA.<sup>15</sup> However, this correspondence, in general, merely reflects the fact of the on-going negotiations and the December 22, 1994 letter agreement, in particular, merely reflects that the drive tests would be conducted in connection with these negotiations. Neither the correspondence nor the letter agreement contain any statements by Sagir explicitly consenting to the continuation of the NECC's SAB extension.

11. Finally, NECC argues that the MO&O is inconsistent with the actions of the staff of the Commercial Wireless Division in this and other similar cases. It states that the Commercial Wireless Division staff was aware of the ongoing negotiations between NECC and Sagir and that it did not indicate to NECC that it was in violation of the Commission's Rules or that it should obtain a waiver of Section 22.911(d)(2)(i). NECC states that the staff also did not instruct it to pull back its contours in response to Sagir's request.<sup>16</sup> NECC alleges that the Commission's staff similarly did not interpose any objections with respect to other mutual contour extension negotiations in which NECC's counsel has participated.<sup>17</sup> However, it does not appear that the parties sought a ruling by the Commercial Wireless Division staff with respect NECC's compliance with Section 22.911(d)(2)(i) of the Rules. Nor was the staff requested to grant NECC a waiver of this rule. Certainly, even if the Commercial Wireless Division staff was fully apprised of Sagir's requests of NECC to remove its SAB extension and NECC's failure to do so, the fact that it did not take any enforcement actions on its own initiative does not constitute a grant to NECC of a waiver of its obligations as a cellular licensee, unequivocally prescribed by Commission's Rules.

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<sup>15</sup> Petition, Exhibit A.

<sup>16</sup> Petition, p. 6.

<sup>17</sup> Petition, p. 8.

**IV. ORDERING CLAUSE**

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 208, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) & 208, and Sections 0.321 and 1.106(j) of the Commission's Rules, 47 C.F.R. §§ 0.321 & 1.106(j), that the Petition For Partial Reconsideration filed by N.E. Colorado Cellular, Inc. is DENIED.

**FEDERAL COMMUNICATIONS COMMISSION**

**Howard C. Davenport  
Chief, Enforcement and Consumer Information Division  
Wireless Telecommunications Bureau**