

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

In the Matter of )
Alee Cellular Communications Cellular )
Radiotelephone Station KNKN271, )
New Mexico RSA 3, Market 555A )
Application for Review )
Request for Extension of Special Temporary ) File No. 000107010
Authority To Operate )

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 2003

Released: August 8, 2003

By the Commission:

I. INTRODUCTION

1. We have before us an Application for Review filed by Alee Cellular Communications ("Alee") on July 1, 2002, and a related request for an extension of Special Temporary Authority (STA) filed by Alee on October 25, 2002. The Application for Review seeks review of a May 30, 2002 Letter from the Commercial Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau) implementing the Commission's revocation of cellular call sign KNKN271, held by Alee for the New Mexico 3 RSA, Market 555A (NM3). The Bureau's Letter also granted special temporary authority to

1 Application for Review filed by Alee Cellular Communications (July 1, 2002) (Application for Review). Alee also filed a supplement to its Application for Review on July 11, 2002.

2 See Application of Alee Cellular Communications for Renewal/Modification, File No. 000107010 (Oct. 25, 2002). On August 6, 2002, Alee also filed a Request for Stay of the processing of applications filed for authority to operate in the New Mexico 3 RSA, Market 555A. See Request for Stay filed by Alee Cellular Communications (Aug. 6, 2002) regarding the Applications of Alltel Communications of the Southwest, Commnet Capital, LLC, McElroy Electronics Corporation, Smith Bagley, Inc., and WWC License, L.L.C. (File Nos. 0000959430, 0000922001, 0000913369, 0000959846, 0000960815, 0000959496, 0000959387).

3 See Letter to Alee Cellular Communications from Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, dated May 30, 2002. The Bureau's action was taken pursuant to the Commission's order in In re Applications of ALGREG Cellular Engineering, et al., Memorandum Opinion and Order, 12 FCC Rcd 8148, 8172-8181 (1997) (Algreg I), pet. for recon. denied, Memorandum Opinion and Order and Order on Reconsideration, 14 FCC Rcd 18524, 18533-18535 (1999) (Algreg II), aff'd, Alee Cellular Communications v. FCC, No. 99-1460 (D.C. Cir. Jan. 30, 2001), pet. for rehearing denied (D.C. Cir. Apr. 5, 2001), pet. for writ of cert. denied (S.Ct. Oct. 9, 2001). Specifically, the Commission held that Alee made false statements to the Commission, lacked the candor required of licensees, and accordingly was not qualified to hold a cellular license for the New Mexico 3 RSA. Id. See also In the Matter of Application of Alee Cellular Communications for

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Alee to continue to operate its cellular system in the NM3 RSA for the lesser of 180 days from May 30, 2002, or 60 days following receipt of written notification from a new licensee authorized to provide service in any part of Alee's currently authorized cellular geographic service area in the NM3 RSA. The request for extension of STA seeks an extension of Alee's STA to operate cellular service under call sign KNKN271 for the lesser of 180 days or resolution of the pending filings related to call sign KNKN271.<sup>4</sup> For the reasons discussed below, we deny Alee's Application for Review and the Request for Extension of STA.

## II. BACKGROUND

2. The issue in this proceeding stems from the Commission's previous holding in the so-called *Algreg* proceeding.<sup>5</sup> Specifically, Alee's NM3 authorization was designated for hearing and possible revocation, along with additional RSA applications and licenses, in connection with participation in a risk-sharing arrangement at the time of filing of the applications.<sup>6</sup> In addition, the NM3 license was designated due to alien ownership concerns and for lack of candor.<sup>7</sup> The Commission concluded that Alee's lack of candor in connection with the NM3 authorization warranted revocation of the license.<sup>8</sup>

3. The Commission observed that Alee's NM3 application, filed on August 12, 1988, listed Shafi M. Sharifan, a four percent general partner who was an alien.<sup>9</sup> Under the policies then in effect, having a non-U.S. citizen or entity holding any general partnership interest was absolutely disqualifying.<sup>10</sup> On September 23, 1988, Sharifan's interest was transferred to a U.S. citizen. Subsequently, in December 1988, Alee won the NM3 lottery. On January 9, 1989, Alee filed a section 1.65 amendment that

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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*, 17 FCC Rcd. 3237 (2002).

In connection with the license revocation, the Bureau released a *Public Notice* on May 31, 2002, inviting interested parties to file applications under the Phase II cellular unserved area application rules contained in Part 22 of the Commission's rules. Wireless Telecommunications Bureau Implements Revocation of Cellular Call Sign KNKN271 (NM3 RSA); Phase II Unserved Area Application Rules to be Applied, *Public Notice*, 17 FCC Rcd 10518 (2002) (*Revocation Public Notice*).

<sup>4</sup> See ULS File No. 0001070107, Attachment 1. Commnet Capital, LLC and McElroy Electronics Corporation opposed extension of the STA. See Petition to Deny, or Alternatively, Informal Objection filed by Commnet Capital, LLC and McElroy Electronics Corporation (Nov. 14, 2002) ("*Opposition to Alee's Request for Extension of STA*").

<sup>5</sup> See *supra* note 3.

<sup>6</sup> In re Applications of Algreg Cellular Engineering, et al., *Hearing Designation Order*, 6 FCC Rcd 2921, 2928 (Com. Car. Bur. 1991).

<sup>7</sup> *Id.*

<sup>8</sup> *Algreg I*, 12 FCC Rcd at 8172-8181. The Commission also concluded that participation in the risk-sharing arrangement was not a basis for the denial of pending applications or the revocation of licenses, including that held by Alee in NM3. *Id.* at 8157-8169. The foreign ownership issue also was determined not to provide a basis for revoking Alee's authorization in light of changes made to Section 310(b) by the Telecommunications Act of 1996. *Id.* at 8170-8171.

<sup>9</sup> *Id.* at 8172.

<sup>10</sup> The Commission's rules at that time also explicitly prohibited precisely the type of transaction undertaken by Alee to replace its non-U.S. partner. See *id.* at 8175 (strict rules that govern the processing of cellular applications provide that the inclusion of an alien general partner is a major defect that cannot be corrected by amendment); see also 47 C.F.R. §§ 22.20(a)(2) (rule governing acceptability) and 22.918(b) (rule governing acceptance of amendments to cellular applications) (1988).

continued to list the non-U.S. citizen as a partner *and* inaccurately stated that all the partners were U.S. citizens. More than a year later, on April 30, 1990, Alee filed a letter disclosing the errors in the application and a section 1.65 amendment – stating that one of its initial partners was not a U.S. citizen and that his partnership interest had been sold to a U.S. citizen several months before the section 1.65 amendment was signed and filed. The Commission concluded, based on its independent review of the record, that Alee, understanding that this was a matter that could adversely affect the grant of the construction permit, had intentionally concealed the presence of the alien partner.<sup>11</sup> The Commission further explained that Alee, aware that it had an alien partner, filed an amendment representing that all of its partners were United States citizens. Noting that Alee did not need to consult an attorney, let alone communications counsel, in order to appreciate that information filed with a federal agency should be truthful, the Commission found that “the record establishes a sufficient likelihood of intentional concealment of relevant information . . . .”<sup>12</sup> Finally, the Commission was “unimpressed” by “Alee’s ‘voluntary’ reporting of this matter to the Commission in its April 30, 1990 letter to the FCC Secretary.”<sup>13</sup> While the Commission acknowledged that Alee’s letter was the basis for the specification of lack of candor and alien ownership issues against it, the Commission concluded that Alee both delayed reporting the matter and failed to make a full disclosure of the facts related to Mr. Sharifan and his replacement in the partnership.<sup>14</sup>

4. The Commission rejected Alee’s request for reconsideration regarding the finding of lack of candor and the revocation of Alee’s NM3 cellular license.<sup>15</sup> In addressing the request for reconsideration, the Commission found that Alee had presented no new evidence that would warrant any reconsideration.<sup>16</sup>

5. Alee appealed the Commission’s action to the D.C. Circuit Court of Appeals. While Alee’s appeal was pending, on September 8, 2000, Alee filed an application for renewal of its authority to operate under call sign KNKN271.<sup>17</sup> On October 12, 2000, Alee supplemented its renewal application to inform the Commission that it was a party to the Algreg proceeding and that its case was pending for review at the U.S. Court of Appeals.<sup>18</sup> The Bureau granted the renewal application in a *Public Notice*, released on December 13, 2000.<sup>19</sup>

6. On January 31, 2001, the D.C. Circuit affirmed the Commission’s decision to revoke Alee’s license for lack of candor, “essentially for the reasons stated by the Commission.”<sup>20</sup> The Court stated that “substantial evidence supported the Commission’s determination that Alee Cellular Communications lacked candor in failing to reveal that it had an alien general partner and that there had been a change in its partnership structure.”<sup>21</sup> The Court found the evidence sufficient to support the Commission’s conclusion that Alee’s partners knowingly and intentionally withheld relevant information from the

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<sup>11</sup> *Id.* at 8175-8181.

<sup>12</sup> *Id.* at 8175-76.

<sup>13</sup> *Id.* at 8180-8181.

<sup>14</sup> *Id.*

<sup>15</sup> *See Algreg II*, 14 FCC Rcd at 18533-18535.

<sup>16</sup> *Id.* at 18534.

<sup>17</sup> *See* File No. 0000216499.

<sup>18</sup> Letter to Secretary Magalie Roman Salas from John P. Bankson, Jr., Drinker Biddle & Reath LLP, Counsel for Alee Cellular Communications, dated Oct. 12, 2000 (“*Supplement to Renewal Application*”).

<sup>19</sup> Wireless Telecommunications Bureau Site-By-Site Action, *Public Notice*, Report No. 721 (rel. Dec. 13, 2000).

<sup>20</sup> *Alee Cellular Communications v. FCC*, No. 99-1460, slip op. at 1 (D.C. Cir. Jan. 31, 2001).

<sup>21</sup> *Id.* (citing *Algreg Cellular Eng’g*, 12 F.C.C.R. 8148, 8172-80 (1997)).

Commission, thus providing the Commission with ample basis to sanction Alee for its misconduct.<sup>22</sup> The D.C. Circuit denied Alee's petition for rehearing on April 5, 2001, and the Supreme Court denied Alee's petition for writ of certiorari on October 9, 2001.<sup>23</sup>

7. As stated previously, the Bureau issued a Letter on May 30, 2002, and released a corresponding *Public Notice* on May 31, 2002, implementing the outcome of the Court's holding.<sup>24</sup> In addition to granting special temporary authority to Alee to continue to operate its cellular system in the NM3 RSA for the lesser of 180 days from May 30, 2002, or 60 days following receipt of written notification from a new licensee in the NM3 RSA, the *Public Notice* invited interested parties to file applications under the Phase II cellular unserved area application rules contained in Part 22 of the Commission's rules.<sup>25</sup>

8. On July 1, 2002, Alee filed an Application for Review of the Bureau's May 30, 2002 Letter.<sup>26</sup> In its Application for Review, Alee asserts that the renewal grant was a new Commission authorization, independent of Alee's initial license, that placed no conditions on its action, and thus conveyed a new license to Alee. Consistent with this action, Alee asserts that the Commission must initiate an entirely new revocation process to revoke this new license.<sup>27</sup> In connection with its Application for Review, on October 25, 2002, Alee filed a request for extension of its STA for the lesser of 180 days or resolution of the pending filings related to KNKN271.<sup>28</sup>

### III. DISCUSSION

9. In its Application for Review, Alee argues that the renewal grant is a new Commission authorization that is independent of Alee's initial license and the Commission's revocation thereof, because the Bureau granted the renewal without placing any conditions on its action.<sup>29</sup> Alee asserts that no Commission precedent suggests that an unconditional renewal authorization is automatically revoked if a prior revocation of an initial license, on appeal at the time of renewal, becomes "final" after the renewal grant.<sup>30</sup> Alee thus argues that in order to revoke the new license the Commission must initiate an entirely new revocation process because the renewal authorization acts effectively as a new license. In support of its position, Alee states that Section 301 of the Act states that "no . . . license shall be construed to create any right, beyond the terms, conditions, and periods of the license" and that the Supreme Court has made it clear that an initial license and a renewal license are totally separate authorizations.<sup>31</sup> Alee contends that the Bureau's attempt to revoke the license without notice and an opportunity for Alee to

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<sup>22</sup> *Id.* The Court stated that the Commission's decision to revoke Alee's license for its lack of candor lies well within the agency's broad discretion to apply an appropriate sanction to licensee misconduct. *Id.* (citing *West Coast Media, Inc. v. FCC*, 695 F.2d 617, 622 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 816 (1983)).

<sup>23</sup> Alee Cellular Communications, No. 01-15, pet. for writ of cert. denied (S.Ct. Oct. 9, 2001).

<sup>24</sup> *See supra* note 3 and accompanying text.

<sup>25</sup> *Revocation Public Notice* at 1.

<sup>26</sup> Application for Review at 1.

<sup>27</sup> Application for Review at 4.

<sup>28</sup> *See* File No. 000107010, Attachment 1.

<sup>29</sup> Application for Review at 4.

<sup>30</sup> *Id.*

<sup>31</sup> Application for Review at 5 (citing 47 U.S.C. § 301 and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)).

respond to the revocation of its renewal license violates Section 312 of the Act and Section 558(c) of the Administrative Procedure Act.<sup>32</sup>

10. We do not find Alee's argument persuasive. In *Algreg I and II*, the Commission conclusively determined that Alee lacked candor with respect to its application and related filings for the NM3 authorization.<sup>33</sup> The Commission has made clear that applicant and licensee candor is a fundamental character quality that goes to the overall qualifications of an entity to hold a license; it is not limited to the merits of a single application.<sup>34</sup> Thus, the Commission's finding of lack of candor against Alee affects not only Alee's ability to hold the initial NM3 license, it also extends to other licenses and authorizations stemming from such licenses.<sup>35</sup> Correspondingly, the revocation of Alee's NM3 license resulting from the lack of candor finding, and any pending judicial review thereof, would also extend to the related renewal authorization.

11. With regard to the impact of the renewal of the license for call sign KNKN271 without an express condition, the Commission has previously stated that renewal of a license does not by itself grant new authority removing or modifying conditions that were applicable at the time the original license was granted. Renewal authority is approval to continue operating under the terms and conditions of the original license.<sup>36</sup> In addition, renewal of a license does not constitute affirmation that an initial station license is properly issued.<sup>37</sup> Alee's renewal authorization therefore did not alter the fact that Alee's authority to continue operating pursuant to the original license was conditioned on the outcome of the pending judicial review. Accordingly, we reject Alee's argument that the Bureau's "unconditional" grant of the renewal authorization provided it with a "new," unencumbered license. Moreover, we take issue with Alee's assertion that it received a "new" license without any conditions, particularly since Alee filed a supplement to its renewal application acknowledging that its authorization was subject to the pending appeal.<sup>38</sup> Specifically, in response to Question 45 of Form 601,<sup>39</sup> Alee submitted a supplement that "refers to the Commission's CC Docket No. 91-142 and United States Court of Appeals (District of Columbia Circuit) Case No. 99-1460" and acknowledged that it was an "appellant" and a "licensee party" in those proceedings.<sup>40</sup> Given this disclosure, we find it disingenuous for Alee to argue that it received a renewal authorization "not subject to any conditions."<sup>41</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Algreg I*, 12 FCC Rcd at 8172-8181; *Algreg II*, 14 FCC Rcd at 18533-18535.

<sup>34</sup> See, e.g., *Pass Word, Inc.*, 76 FCC Rcd 465 (1980), *aff'd per curiam Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982).

<sup>35</sup> See 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*, 17 FCC Rcd. 3237 (2002).

<sup>36</sup> See In the Matter of Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order on Remand*, 18 FCC Rcd 4189, 4192, ¶ 9 (2003); In the Matter of Donna J. Olson Automatic Cancellation of License for Station WPFN331, *Order*, DA 03-843 (rel. Mar. 21, 2003) ("*Olson Order*").

<sup>37</sup> *Olson Order*, DA 03-843 at 2, ¶ 6.

<sup>38</sup> See *Supplement to Renewal Application*.

<sup>39</sup> Question 45 of the FCC Form 601 states: "Has the applicant . . . had any FCC station authorization, license, or construction permit revoked . . . by the Commission?"

<sup>40</sup> See *Supplement to Renewal Application*.

<sup>41</sup> Application for Review at 4. Although Alee asserts that it "supplemented its renewal application to inform the Commission that it was a party to the Algreg proceeding and that its case was pending for review at the U.S. Court of Appeals," we find Alee's renewal application and its supplement to be less than forthcoming about the nature of

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12. Finally, Alee could not have renewed a license that it no longer held. As stated previously, in the *Algreg* proceeding, Alee's license was revoked for lack of candor and Alee was "authorized to continue to operate Station KNKN271 until final disposition of all administrative and/or judicial review."<sup>42</sup> Accordingly, once the license was revoked, there was nothing for Alee to renew. At most, Alee possessed a form of temporary or interim authority to continue operating Station KNKN271 until resolution of the pending litigation. By submitting a renewal application, Alee preserved only the right to claim a renewal of the original license *if* it prevailed on appeal and the original license was reinstated.

13. Accordingly, we deny Alee's Application for Review and affirm the actions taken by the Division to effect the Commission's revocation of the license for call sign KNKN271, New Mexico RSA 3, Market 555A, as reflected in *Algreg I* and reaffirmed by the Commission and the courts.

14. In light of this action, we will grant Alee an extension of its existing STA authority for 90 days. The sole purpose of this extension is to permit Alee to complete an orderly termination of its cellular operations in NM3 and to ensure that any customers it may have<sup>43</sup> are provided with an adequate opportunity to make alternative arrangements for wireless service.<sup>44</sup> At this time, we do not anticipate entertaining any additional requests from Alee for further extension of the NM3 STA.

15. The extension of STA remains subject to the same conditions imposed when the STA was first issued<sup>45</sup> and include:

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the pending judicial review and its relation to the license being renewed. Alee's renewal application, filed September 8, 2000, does not respond, either affirmatively or negatively, to Question 45 of FCC Form 601 regarding whether the applicant, Alee, has had a license revoked. Moreover, Alee submitted the supplemental letter on October 12, 2000, more than a month after the renewal application, and makes no mention of the fact that its license was revoked in 1997. Stating that it is responding only "in an abundance of caution," Alee's supplemental filing merely directs Commission staff processing the renewal application to the docket numbers for the Commission and the D.C. Circuit proceedings and describes the role of the *renewal applicant*, Alee, in such proceedings as either "appellant" or "licensee party" without providing either context or a nexus to the *license* being renewed.

<sup>42</sup> *Algreg I*, 12 FCC Rcd at 8190, ¶ 104 (pursuant to Section 312(a)(2) of the Communications Act, the license for Alee is revoked and Alee is authorized to continue to operate the station until six weeks after release of the Memorandum Opinion and Order but "if the licensee seeks reconsideration or judicial review of our action revoking its license, it is authorized to continue to operate Station KNKN271 until final disposition of all administrative and/or judicial appeals.").

<sup>43</sup> There is a real question whether Alee has any direct retail customers of its own or only provides roaming service. In their *Opposition to Alee's Request for Extension of STA*, Commnet Capital, LLC and McElroy Electronics Corporation assert that "nowhere in its STA Request does Alee state that it has any of its own subscribers; rather, it refers cryptically to 'customers being served in NM-3. . .'. Alee avoids saying whether such 'customers' are Alee's customers or incoming roamers." See *Opposition to Alee Request for Extension of STA* at 4. Commnet and McElroy also point out that "at this time there are no remaining subscribers of Alee that would suffer undue disruption from any termination of Alee's service. Moreover there would be no disruption of service to incoming roamers, because Alee's CGSA is duplicated by the CGSA of Verizon Wireless as well as by various broadband PCS licensees." See *Opposition to Alee Request for Extension of STA* at 2.

<sup>44</sup> In opposing Alee's request for extension of its STA, Commnet and McElroy assert that further extension is not warranted since "[a]ny such customers, if they exist, have had six months to obtain service from one of the other cellular or PCS licensees serving this geographic area." See *Opposition to Alee Request for Extension of STA* at 4 n.4.

<sup>45</sup> See Letter to Alee Cellular Communications from Katherine M. Harris, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau, dated May 30, 2002.

1. Alee is not permitted to solicit or add new subscribers in the NM3 market while it is operating under the grant of STA.
2. Alee shall provide written notice to each of its subscribers at least 30 days prior to permanently discontinuing service.<sup>46</sup>
3. After the expiration of the STA or any renewals or extension thereof, Alee will no longer be authorized to provide further service and shall cease any and all operations in the NM3 market.
4. At such time as Alee shall cease operations in the NM3 market, Alee shall notify the Commission and shall provide the date upon which its operations ceased.
5. The Commission may terminate or modify the STA in its discretion in furtherance of the public interest.

#### IV. ORDERING CLAUSE

16. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i), 5(c)(5), and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), 303(r), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, the Application for Review filed by Alee Cellular Communications on July 1, 2002, IS DENIED.

17. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and 309(f) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 309(f), and sections 0.331 and 1.931 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.931, the Request for Extension of STA filed by Alee Cellular Communications on October 25, 2002, IS GRANTED to the extent set forth above and otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>46</sup> Alee shall also provide a copy of such notice to the Commission.