



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 22

WT Docket No. 12-40; FCC 19-26

Cellular Service, Including Changes in Licensing of Unserved Area

AGENCY: Federal Communications Commission.

ACTION: Denial of petition for reconsideration.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses the Petition for Reconsideration (Petition) filed on behalf of the Critical Messaging Association (CMA) regarding the Commission's Third Report and Order in the Cellular Reform proceeding (Cellular Third R&O). The Commission denies the Petition.

DATES: As of [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], the petition is denied.

ADDRESSES: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Nina Shafran, Wireless Telecommunications Bureau, (202) 418-2781 or TTY: (202) 418-7233.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order on Reconsideration in the Cellular Reform proceeding, WT Docket No. 12-40, RM Nos. 11510 and 11660, FCC 19-26, adopted March 20, 2019 and released March 22, 2019 (Reconsideration Order). The full text of the Reconsideration Order is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street SW, Room CY-A257, Washington, DC 20554, or by downloading the text from the Commission's website at <https://docs.fcc.gov/public/attachments/FCC-19-26A1.pdf>. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to FCC504@fcc.gov or calling the Consumer and Government Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

I. Introduction.

1. In the Cellular Third R&O, 83 FR 37760 (Aug. 2, 2018), the Commission deleted several administrative and recordkeeping rules for Part 22 licensees, eliminating outdated burdens that were inconsistent with the Commission's practices and the current predominant use of electronic records storage and access. The Commission also deleted in its entirety a rule regarding Equal Employment Opportunity (EEO) requirements for Part 22 licensees (47 CFR 22.321). That Rule contained a number of EEO provisions, including paragraph (c) which required each Part 22 licensee to file an EEO complaints report annually regardless of the licensee's size. The Commission noted that Rule 22.321 was subsumed by another rule applying all such requirements, including the annual EEO complaints reporting requirement, to all Commercial Mobile Radio Service (CMRS) licensees—namely, Rule 90.168. The Commission concluded that, because all CMRS licensees, including Part 22 CMRS licensees, are subject to Rule 90.168, Rule 22.321 was rendered duplicative and unnecessary in its entirety.

2. CMA timely filed a Petition for Reconsideration. CMA did not seek reconsideration of any rule change implemented in the Cellular Third R&O; rather, it asked the Commission to reconsider its interpretation of Rule 90.168. CMA argued that the Commission erred in construing Rule 90.168 to apply to CMRS providers that are not licensed under Part 90. Accordingly, CMA contended that with the deletion of Rule 22.321, CMRS providers licensed under Part 22 were subject only to the annual EEO reporting obligations found in Rule 1.815, which do not apply to providers with fewer than 16 employees. The Commission denies the Petition.

II. Discussion.

3. The Commission rejects CMA's argument that Rule 90.168 applies solely to those CMRS licensed under Part 90, which, according to CMA, consist only of CMRS licensees operating in the Industrial/Business Radio Pool. With respect to the annual EEO complaints reporting requirement, CMA argued that Rule 90.168(c), when read together with Rule 90.1(b), subjects each CMRS licensee in the Industrial/Business Radio Pool to that annual requirement, regardless of how many employees it has, but that other CMRS licensees are not covered by Rule 90.168(c) or any other provision of Rule 90.168.

CMA supplemented its Petition with an ex parte filing in which it noted that, when the Commission adopted 47 CFR 90.168 along with numerous other provisions in 1994 in the CMRS rulemaking proceeding, it was carrying out a directive to implement the Omnibus Budget Reconciliation Act of 1993 (OBRA). Citing that proceeding's CMRS Second Report and Order, CMA argued that Rule 90.168 "and its companions were adopted and applied to Part 90 CMRS licensees (and only Part 90 CMRS licensees) in order to bring them up to the same standards already and historically applied to Part 22 CMRS licensees."

4. The Commission denies the CMA Petition as fundamentally misreading the purpose of the Commission's EEO rules and the Commission's intent in the Cellular Third R&O. The Commission has long recognized the importance of having EEO rules that apply to common carriers, including all CMRS providers. The Commission purposely applied its EEO program and policy requirements broadly in 1970, and in that context, it also adopted the complaints reporting requirement for common carriers no matter their size. As the Commission stated at the time, "discriminatory employment practices by a common carrier are incompatible with its operation in the public interest"; it further stated that, in its determinations under the Communications Act of 1934, as amended, the Commission must "take into account allegations raising substantial questions whether the [entity] has violated, or is in violation of, the Civil Rights Act or a pertinent State law in this field."¹ The Commission subsequently reviewed the application of EEO requirements to all CMRS in the CMRS proceeding, a proceeding in which, as CMA alluded, the Commission sought to adopt rules to establish regulatory symmetry among similar CMRS pursuant to congressional mandate. In the 1994 CMRS Third Report and Order, the Commission stated its purpose was to ensure application of the EEO rules "to all CMRS providers." In adopting Rule 90.168, the Commission discussed at length the record evidence and concluded that it is "appropriate and necessary" to do so in order "to achieve the statutory goal of increased ownership opportunities for

¹ Rulemaking to Require Communications Common Carriers to Show Nondiscrimination in Their Employment Practices, Docket No. 18742, Report and Order, 24 F.C.C.2d 725, 726, 728 (1970).

minorities and women in spectrum-based services.”²

5. Against this background, the Commission deleted Rule 22.321 in the Cellular Third R&O, reasoning that Rule 90.168 applies to all CMRS, including Part 22 licensees, and thus subsumes Rule 22.321. The Commission noted that Rule 90.168, with the same title and virtually identical provisions as Rule 22.321, imposes the same obligations on CMRS licensees as those that were in Rule 22.321, including the requirement to file an EEO complaints report annually regardless of the licensee’s size. Concluding that Part 22 licensees were subject to the same EEO obligations under both rules, and with the intent of removing repetitive rules, the Commission deleted Rule 22.321 in its entirety. The Cellular Third R&O was clear that the Commission intended only to delete a duplicative rule and not to change the substantive requirements applicable to CMRS licensees.

6. The Commission disagrees with CMA’s narrow interpretation of the applicability of Rule 90.168. Rule 90.168 begins by requiring that “Commercial Mobile Radio Service licensees”—not a subset of CMRS licensees—afford equal opportunity in employment and not discriminate in employment, and then requires in Rule 90.168(c) that “[e]ach licensee, regardless of how many employees it has, shall submit an annual report to the Commission” indicating whether any EEO complaints have been filed against it. The Commission contrasts 47 CFR 90.168(c) with 47 CFR 1.815, which limits the scope of EEO filings to “common carrier licensee[s] or permittee[s] with 16 or more full time employees,” and concludes that the absence of any such delimiter in Rule 90.168(c) makes clear that the Commission did not intend to limit such EEO obligations only to CMRS licensees with 16 or more full time employees. In addition, the order adopting Rule 90.168 makes clear that the Commission intended that rule to apply to all CMRS licensees, not just to a subset. For similar reasons, the Commission rejects CMA’s argument that the clear text of Rule 90.168 should be set aside because the Commission originally created Part 90 for another purpose. Nothing in that purpose clause (adopted long before Rule 90.168) claims to limit the scope of Part 90 for commercial licensees. And even if it did, the Commission reads the specific language in Rule 90.168 (applying EEO requirements to all CMRS licensees) as governing rather than the

² Implementation of Sections 3(N) and 332 of the Communications Act – Regulatory Treatment of Mobile Services (other captions omitted), GN Docket No. 93-252, PR Docket Nos. 93-144 and 94-212, Third Report and Order, 9 FCC Rcd 7988, 8096-99 (1994).

general language of the purpose clause.

7. Finally, it was not the Commission's intent in the Cellular Third R&O to relieve any licensee of its EEO obligations under the Commission's rules, including the annual complaints reporting requirement, regardless of a licensee's number of employees. Likewise, it was not the Commission's intent that Part 22 licensees only be subject to the Commission's EEO provisions found in Rule 1.815. The Commission reiterates that all CMRS licensees are subject to Rule 90.168, including the requirement that CMRS licensees, regardless of size, file EEO complaint reports.

III. Procedural Matters.

8. Paperwork Reduction Act Analysis. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. Therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.

9. Congressional Review Act. The Commission will send a copy of this Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

10. Regulatory Flexibility Act. As noted, while the Cellular Third R&O removed Rule 22.321, all CMRS licensees continue to be subject to current EEO obligations under the Commission's rules, including the annual complaints reporting requirement. The Commission issued a Final Regulatory Flexibility Analysis (FRFA) that conforms to the Regulatory Flexibility Act of 1980 (RFA), as amended. The Commission received no petitions for reconsideration of that FRFA. In this Reconsideration Order, the Commission promulgates no additional final rules, and its present action, therefore, does not alter the Commission's previous analysis under the RFA.

IV. Ordering Clauses.

11. IT IS ORDERED that, pursuant to Sections 1, 2, 4(i), 4(j), 301, 303, 307, 308, 309, 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 301, 303, 307, 308, 309, 332, and 405, and Section 1.429 of the Commission's rules, 47 CFR 1.429, this ORDER ON

RECONSIDERATION in WT Docket No. 12-40 IS ADOPTED.

12. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and 405, and Section 1.429 of the Commission's rules, 47 CFR 1.429, the Critical Messaging Association Petition for Reconsideration is DENIED.

13. IT IS FURTHER ORDERED that this ORDER ON RECONSIDERATION SHALL BE EFFECTIVE **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

14. IT IS FURTHER ORDERED, pursuant to Section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. 801(a)(1)(A), that the Commission SHALL SEND a copy of this ORDER ON RECONSIDERATION to Congress and to the Government Accountability Office.

List of Subjects in 47 CFR Part 22

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene Dortch,
Secretary.

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