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

In the Matter of
County of Genesee, New York and Sprint Nextel Corp.

ORDER

Adopted: November 3, 2011
Released: November 3, 2011

By the Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau:

1. By this Order, we dismiss the Motion for Leave to Intervene (Motion), filed October 11, 2011 by Oakland County, Michigan (Oakland).\(^1\) Oakland seeks intervenor status in the captioned proceeding pursuant to Section 1.106(b)(1) of the Commission’s rules.\(^2\) We also dismiss Oakland’s petition for reconsideration of the Public Safety and Homeland Security Bureau’s (Bureau) Memorandum Opinion and Order in the Genesee County, New York, proceeding.\(^3\)

I. BACKGROUND

2. On September 9, 2011, the Bureau released a Memorandum Opinion and Order in the captioned proceeding in which it determined that the County of Genesee, New York (Genesee) received “comparable facilities” when the 800 MHz Transition Administrator (TA) assigned Genesee replacement frequencies separated by less than 1 MHz from the lower edge of the ESMR Band.\(^4\) Oakland argues that it is similarly situated to Genesee to the extent it is an 800 MHz public safety licensee located in the Canada border area and the TA has assigned Oakland replacement frequencies separated by less than 1 MHz from the lower edge of the ESMR band. Oakland submits, therefore, that it meets the “aggrieved/adversely affected” test for standing.\(^5\) Oakland asserts that it is entitled to intervention because “[t]he Commission has a long history of granting intervention requests when a third party is adversely affected by a Commission decision.”\(^6\)

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\(^1\) Sprint Nextel Corp. filed an opposition to the Oakland Motion on Oct. 21, 2011 (Opposition).

\(^2\) 47 C.F.R. § 1.106(b)(1). As noted infra the appropriate rule for Motions to Intervene is 47 C.F.R. § 1.223.

\(^3\) County of Genesee, New York and Sprint Nextel, Memorandum Opinion and Order, 26 FCC Rcd 12772 (PSHSB 2011).

\(^4\) Both Oakland and Genesee are located in the Canada Border Region which lacks the 1 MHz guard band that exists in non-border areas of the United States.


II. DISCUSSION

3. We disagree. Section 1.223 of the Commission’s rules provides for petitions to intervene only in cases that have been designated for hearing. Of the four cases cited by Oakland for the proposition that the Commission has a “long history” of granting intervention requests, only one – the staff level decision in *RCN* – addresses a request to intervene in a non-hearing proceeding. That staff level case was effectively overruled by *JNE Investments* where the Commission affirmed that intervention requests are permitted only in hearing proceedings.\(^7\) Neither the Genesee nor Oakland proceedings are in hearing status. Thus, Oakland’s motion is subject to dismissal. However, we exercise our discretion to treat Oakland’s pleading, under Section 1.41 of the Commission’s rules,\(^8\) as an informal request to accept its Petition for Reconsideration of the Genesee *Memorandum Opinion and Order*. We conclude that Oakland lacks standing to submit such a petition.

4. *Aspen FM* cited by Oakland as authority for its being aggrieved/adversely affected by the Genesee *Memorandum Opinion and Order* is inapposite here. The facts are not remotely the same. Standing in *Aspen FM* was conferred because, and only because, the petitioner for reconsideration was a broadcaster that would compete with a proposed broadcast assignee for listeners in the Aspen, Colorado market.\(^9\) Here, however, Oakland’s only claim for standing is its apprehension that the precedent established by the Genesee *Memorandum Opinion and Order* may affect disposition of Oakland’s case should it come before the Public Safety and Homeland Security Bureau for *de novo* review. The controlling Commission case here is *Texas Cable and Telecommunications Assoc. v. GTE Southwest, Inc.*,\(^10\) in which the Commission held that a party’s apprehension that its case would be adversely affected by precedent was not sufficient to confer standing to submit a petition for reconsideration.\(^11\)

III. DECISION

5. When evaluating standing, the Commission applies “the same test that courts employ in determining whether a person has standing under Article III to appeal a court order: the person must

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8 47 C.F.R. § 1.41.


show (a) a personal injury ‘in fact’; (b) that the injury is fairly traceable to the challenged action; and (c) that it is likely, not merely speculative, that the requested relief will redress the injury.”

6. Oakland fails all three prongs of the conjunctive test for standing. It has not shown that it would suffer an injury in fact if its Motion is not granted. If Oakland is unable to reach agreement with Sprint and the matter is referred to the Bureau for de novo review, Oakland’s case will be decided on its own facts and merits. As Sprint points out, the Bureau disposed of a similar issue in the City of Boston case where it dismissed third party petitions on standing grounds because “the Boston Order is limited to the facts presented in the record of that proceeding and does not adversely affect Petitioners.” Likewise, an adverse decision, should Oakland pursue de novo review, would not be fairly traceable to the Genesee decision because Oakland’s case would be decided on the Oakland record; not Genesee’s. Finally, it is unlikely, indeed speculative, that grant of Oakland’s Motion would redress the injury that Oakland perceives. Were we to grant Oakland’s motion we would have to consider an Oakland petition for reconsideration that does little more than reprise arguments made in a petition for reconsideration submitted, by the same counsel, in the Genesee proceeding. Considering such a petition would be an unnecessary drain on Commission resources.

7. The law of the case in these de novo review proceedings is that the perceived precedential effect of decisions on de novo review does not create standing for third parties to submit petitions for reconsideration no matter how foreseeable it may be that similar issues will arise in the petitioner’s own case. We so held in the Boston case, and reaffirm that principle here. Should third parties, in the future, seek to petition for reconsideration on the basis that a decision on de novo review may prejudice their own case, such petitions will be deemed frivolous and will summarily be dismissed. The associated costs in preparing such frivolous pleadings will not be Sprint’s responsibility, and the Bureau will consider whether such a filing was made in good faith.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the Motion to Intervene, filed October 11, 2011 by Oakland County, Michigan, considered as such, IS DISMISSED.

9. IT IS FURTHER ORDERED that the Motion to Intervene, filed October 11, 2011 by Oakland County, Michigan, treated as a request for informal Commission action pursuant to Section 1.41 of the Commission’s rules, IS DENIED.

10. IT IS FURTHER ORDERED that the Petition for Reconsideration filed October 11, 2011 by Oakland County, Michigan IS DISMISSED.

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13 Sprint Opposition at 1-2, quoting Boston Order, 22 FCC Rcd at 2361.
14 Id. at 2.
11. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief - Policy and Licensing Division
Public Safety and Homeland Security Bureau