

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, DC 20554

In re Applications of:	)	
	)	
PORTLAND CELLULAR PARTNERSHIP	)	File No. 27414-CL-P-152-B-86
	)	
NORTHEAST CELLULAR TELEPHONE	)	File No. 27488-CL-P-152-B-86
COMPANY, L. P.	)	
	)	
For facilities in the Domestic Public Cellular	)	
Radio Telecommunications Services on	)	
Frequency Block B, in Market 152, Portland,	)	
Maine	)	

**ORDER**

**Adopted: November 18, 1996; Released: November 21, 1996**

By the Commission:

**I. INTRODUCTION**

1. In this order, we reinstate *nunc pro tunc* and grant the application of Portland Cellular Partnership ("Port Cell") to provide Block B cellular service to the Portland, Maine, New England County Metropolitan Area ("NECMA"). In light of this action, we also rescind the grant of the application of Northeast Cellular Telephone Company, L. P. ("Northeast") to provide the same cellular service, and dismiss as moot Port Cell's petition for reconsideration of the grant of that application. In addition, we grant interim operating authority to Northeast that will terminate ten days after Port Cell serves notice to avoid interruption of service to Northeast's customers.

**II. BACKGROUND**

2. This proceeding has a complicated and protracted history. Although the applications were filed ten years ago, and the Commission has issued four orders, there is still not a final grant in this proceeding.

3. Originally, there were five participants in the lottery for the wireline authorization in Portland. The applicants were selected in the following order: Seacoast Cellular, Inc. ("Seacoast"), Saco River Cellular, Inc. ("Saco River"), Community Services Telephone Company ("Community"), Northeast, and NYNEX Mobile Communications Company ("NYNEX"). As part of a pre-lottery partial settlement agreement, Seacoast substituted its application with the application of Port Cell.<sup>1</sup> Port Cell was then named the tentative selectee.<sup>2</sup>

4. Northeast and Saco River filed petitions against Port Cell alleging, *inter alia*, that Port Cell's application did not comply with Section 22.917(b)(1) of the Commission's Rules.<sup>3</sup> They claimed that a firm financial commitment letter provided by NYNEX Credit Company to Port Cell was inadequate. The staff rejected these arguments, and granted an authorization to Port Cell.<sup>4</sup> The Commission affirmed the grant to Port Cell on different grounds. It held that Port Cell's application did not comply with Section 22.917(b)(1), but waived the required showing, stating that "based on our experience regarding NYNEX Mobile and NYNEX Corporation in other markets and other contexts, and materials on file in other proceedings of which we take official notice, we are quite confident that Port Cell (whose financing was arranged through NYNEX Mobile) is financially qualified." Portland Cellular Partnership, 4 FCC Rcd 2050, 2051 (1989) ("Port Cell I").

5. Northeast and Saco River appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The Court ruled that the Commission's decision was arbitrary and capricious because it was not based on a rational waiver policy, and therefore reversed and remanded the case to the Commission. Northeast Cellular Tel. Co., L.P. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) ("Northeast Cellular"). The court instructed the Commission that "absent a finding" that certain financial information "was considered and used in formulating an articulable waiver standard at the time the waiver was granted, the FCC must disqualify Port Cell's application." Id. at 1167. The court also indicated that "given the record in this case, we cannot imagine any standard that would have justified a waiver . . . ." Id. at 1165. On remand, the Commission found that Port Cell had not met the Section 22.917(b)'s firm financial commitment requirement.

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<sup>1</sup> At that time, the Port Cell partnership consisted of Seacoast (holding a 42 percent interest), NYNEX (48 percent), and Community (10 percent). Port Cell's ownership has since been divided equally among NYNEX, Seacoast, and Lewiston-Auburn Cellular.

<sup>2</sup> See Public Notice, Report No. CL-86-206A (released June 24, 1986).

<sup>3</sup> 47 C.F.R. § 22.917(b)(1) (1986).

<sup>4</sup> Portland Cellular Partnership, 2 FCC Rcd 5586 (Mobile Serv. Div. 1987).

Portland Cellular Partnership, 6 FCC Rcd 2283, 2283-84 (1991) ("Port Cell II"). It also found that Port Cell had provided the Commission with no standard that would support waiver of the financial qualifications requirement, and accordingly the Commission denied the waiver and dismissed the application.<sup>5</sup> Id. at 2284. To prevent the loss of competition and service in the Portland market, however, the Commission granted Port Cell interim operating authority. Id.

6. The Commission's staff then named Northeast as the tentative selectee.<sup>6</sup> Port Cell, Saco River, and Community all filed petitions to deny Northeast's application. In Portland Cellular Partnership, 8 FCC Rcd 4146 (1993) ("Port Cell III"), the Commission denied the petitions to deny and granted Northeast's application. The Commission reaffirmed its dismissal in Port Cell II of Port Cell's and Saco River's applications. In addition, it dismissed Port Cell's petition for reconsideration of the dismissal of its application in Port Cell II, which raised for the first time issues regarding the Paperwork Reduction Act ("PRA"),<sup>7</sup> because the petition was filed nearly a year after the statutory deadline for filing such a pleading. The Commission stated that it had no discretion to consider such a pleading.<sup>8</sup> Port Cell III, 8 FCC Rcd at 4146 n.4. Finally, the Commission modified Port Cell's interim authority to allow it to continue operation until Northeast was ready to commence service. Id. at 4152.

7. Port Cell and Community each timely filed petitions for reconsideration of Port Cell III regarding the grant of Northeast's application to serve Portland. Port Cell additionally filed a petition for further reconsideration of the dismissal of its application, and a motion to stay that decision. In its motion for stay, Port Cell argued that the PRA

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<sup>5</sup> The application of the next ranked applicant, Saco River, was returned as defective because it had proposed a 39 dBu contour extension into the adjoining NECMA which was not *de minimis*. See 47 C.F.R. § 22.20 (1990). Saco River sought judicial review of this action. Saco River Cellular, Inc. v. FCC, No. 91-1248 (D.C. Cir. filed May 24, 1991) ("Saco River"). This case has been held in abeyance pending conclusion of these administrative proceedings.

<sup>6</sup> Public Notice, Report No. CL-9-39 (Mobile Serv. Div. released April 30, 1991).

<sup>7</sup> 44 U.S.C. §§ 3501-3520.

<sup>8</sup> Section 405 of the Communications Act of 1934, as amended, establishes a 30-day deadline for filing petitions for reconsideration. 47 U.S.C. § 405.

precluded the Commission's actions. The staff denied the motion.<sup>9</sup> The D.C. Circuit also denied Port Cell's contemporaneous motion which raised similar arguments.<sup>10</sup>

8. In Portland Cellular Partnership, 9 FCC Rcd 3291 (1994) ("Port Cell IV"), the Commission affirmed its dismissal of Port Cell's petition for reconsideration as untimely. Id. at 3291-92. It found that Port Cell's failure to raise its PRA arguments in a timely manner imposed a heavy burden on the court, the Commission, and the other parties to this proceeding because resources were consumed litigating Port Cell's compliance with the financial qualifications rule and the related waiver issue. Id. at 3292. Moreover, the Commission found no countervailing public interest reason to reconsider its prior decision on its own motion, particularly in light of the court's instruction that it "must disqualify Port Cell's application" in the absence of certain financial information not present. Id. at 3292 n.3. Therefore, it denied the petition. The Commission also dismissed in part and denied in part Community's petition for reconsideration. Id. at 3292. Port Cell sought review and a stay pending review of Port Cell IV in the D.C. Circuit.<sup>11</sup> The court denied Port Cell's motion for stay and dismissed its petition for review as "incurably premature." Saco River Cellular, Inc. v. FCC, Nos. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1994), *reh'g denied* (D.C. Cir. Dec. 9, 1994).

9. Two requests are before us: (1) a petition for reconsideration filed by Port Cell on July 2, 1993, requesting that Northeast's license be rescinded and that Northeast's application be designated for hearing on real-party-in-interest grounds; and (2) a motion for reinstatement filed by Port Cell on October 11, 1995, requesting that, under the Paperwork Reduction Act of 1995 ("PRA of 1995"),<sup>12</sup> Port Cell's application be reinstated and granted because the Commission did not receive prior approval from the Office of Management and

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<sup>9</sup> Portland Cellular Partnership, 8 FCC Rcd 6213 (Com. Car. Bur. 1993).

<sup>10</sup> Saco River Cellular, Inc. v. FCC, No. 91-1248, *et al.* (D.C. Cir. Sept. 16, 1993) (construing motion for stay as petition for writ of mandamus and denying petition), *reh'g denied* (D.C. Cir. Nov. 24, 1993) ("Port Cell has failed to show that the Federal Communications Commission clearly usurped its power when it declined to consider Port Cell's untimely petition for reconsideration containing the Paperwork Reduction Act argument."). Port Cell also unsuccessfully raised PRA arguments in Portland Cellular Partnership v. United States, Civ. Act. No. 94-61P-C (D. Me. June 6, 1994), *appeal voluntarily dismissed*, No. 94-1743 (1st Cir. July 28, 1994), in which the court dismissed for lack of jurisdiction Port Cell's motion for preliminary injunction seeking to enjoin on PRA grounds the Commission's termination of Port Cell's interim operation of the Portland cellular system.

<sup>11</sup> Portland Cellular Partnership v. FCC, No. 94-1500 (D.C. Cir. filed July 7, 1994). The court consolidated the appeal with the pending appeal in Saco River.

<sup>12</sup> Pub. L. No. 104-13, 109 Stat. 163 (1995), *amending and recodifying* 44 U.S.C. §§ 3501-3520.

Budget ("OMB") under the PRA for the firm financial commitment requirement that served as the basis for dismissal of Port Cell's application. In particular, Port Cell argued that new Section 3512 of the PRA of 1995 requires the Commission to consider its arguments even if they are otherwise untimely. Various responsive and additional pleadings and letters have been filed.<sup>13</sup> In addition, the General Counsel requested the Office of Legal Counsel of the Department of Justice ("OLC") to provide its views on the proper interpretation of Section 3512 because of the "broad implications" of the issues raised in the proceeding, and because "the PRA is not within the Commission's core expertise."<sup>14</sup> OLC declined to provide an opinion based on its policy of not providing advice in the context of a pending adjudicatory proceeding.<sup>15</sup>

### III. DISCUSSION

#### A. Propriety of Considering Port Cell's Arguments

10. We turn first to Port Cell's reinstatement request because our resolution of that request may moot Port Cell's reconsideration petition. As noted above, we have twice rejected as untimely Port Cell's attempts to raise PRA issues. The threshold issue before us is thus whether, as argued by Port Cell, passage of the PRA of 1995, which amended the prior PRA, requires us now to consider its arguments of alleged violations of the PRA. For the reasons discussed below, although we recognize the strong policy reasons not to do so, we conclude that, under the PRA of 1995, we are indeed required to consider Port Cell's PRA arguments at this late stage of the proceeding.

11. Prior to 1995, the "public protection" provision of the PRA, 44 U.S.C. § 3512, provided:

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<sup>13</sup> The litigiousness of the parties in this proceeding has been staggering, and has unnecessarily complicated and prolonged this proceeding. Many of the pleadings and letters before us are unauthorized. Nevertheless, in order to avoid further disputes over our decision, even if not specifically referenced, we have reviewed the entire record filed prior to September 15, 1996, and we address all relevant arguments filed up to that date. We have not reviewed materials filed after September 15, 1996, because, if we did not impose a cut-off on reviewing unauthorized pleadings, given the litigiousness of the parties, resolution of this case would be even further delayed.

<sup>14</sup> Letter from General Counsel William E. Kennard to Assistant Attorney General Walter Dellinger, OLC (Apr. 29, 1996).

<sup>15</sup> Letter from Deputy Assistant Attorney General Richard L. Shiffrin, OLC, to General Counsel Kennard (June 27, 1996).

Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved . . . does not display a current control number assigned by the Director [of OMB].

12. Under this section, if an agency promulgates an information collection without OMB approval, "members of the public may ignore it without risk of penalty." Dole v. United Steelworkers of America, 494 U.S. 26, 40 (1990). The pre-1995 version of the PRA did not specifically indicate that Congress intended this "public protection" provision to override provisions of other statutes (or prudential considerations) requiring that arguments be raised in an administrative or judicial proceeding in a timely fashion, or to override the instructions to an agency in a judicial remand. Accordingly, in our prior decision, we took the view that PRA arguments need not be addressed if they were untimely under Section 405(a) of the Communications Act, 47 U.S.C. § 405(a),<sup>16</sup> especially where consideration would be inconsistent with the instructions of a court in a remand order. See Port Cell IV, 9 FCC Rcd at 3291-92 & n.3.

13. As Port Cell points out, however, the PRA of 1995 contains significant new language relevant to the timeliness of PRA arguments. After re-phrasing the prior Section 3512 as a new Section 3512(a), Congress added the following new Section 3512(b) (emphasis added):

The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise *at any time during the administrative process or judicial action applicable thereto.*

14. The legislative history of this provision reinforces the clear statutory language. Senator Roth, Chairman of the Senate Governmental Affairs Committee and co-sponsor of the PRA of 1995 in the Senate, observed

that the protection of Section 3512 may be raised at any time during the life of the matter. The protection cannot be waived. Failure to raise them at an early stage does not preclude later assertion of rights under this section, regardless of any agency or judicial rules to the contrary.

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<sup>16</sup> Section 405(a) provides, in pertinent part: "A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of."

141 CONG. REC. S5274-75 (Apr. 6, 1995). *See also* 141 CONG. REC. H4376 (Apr. 6, 1995) (statement of Rep. Clinger) (public protection provision permits the defense to be raised "at any time in an ongoing dispute").

15. Northeast argues that despite the "at any time" language of Section 3512(b), a PRA issue may still not be raised if raising it would be untimely under another statutory provision. Its basis for this argument is that while Section 3512(a) is prefaced by the phrase "notwithstanding any other provision of law," Section 3512(b) contains no such language. We find this argument unpersuasive. The provision that a PRA issue may be raised "at any time" would be rendered meaningless if the phrase "except as otherwise provided by law or judicial order" was engrafted onto that section. In any event, to the extent ambiguity exists on this point, the legislative history quoted above resolves it decisively. In light of the fact that the statute permits PRA issues to be raised "at any time" in an administrative or judicial proceeding, Northeast's arguments that consideration of the PRA arguments now would be inconsistent with Sections 402(h)<sup>17</sup> and 405(a) of the Communications Act are unavailing. Sections 3512(b) simply trumps Section 405(a) and, to the extent it might be relevant, Section 402(h).

16. We do not agree with Northeast that Port Cell is raising its PRA defense outside of the administrative process. Port Cell's petition for reconsideration is still pending before us, and therefore the administrative process for licensing and operating the cellular system to serve the Portland NECMA is ongoing.<sup>18</sup> Consequently, Port Cell's motion raising Section 3512 relates to an on-going administrative process. Northeast complains that interpreting Section 3512(b) in this manner "creates absolute administrative and judicial chaos and anarchy." But as the legislative history quoted above indicates, Congress deliberately devised a remedy enabling the public to raise PRA violations without limitation, so long as the administrative or judicial process in connection with a particular license or with a particular application continues.

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<sup>17</sup> Section 402(h) provides.

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

<sup>18</sup> Indeed, for this reason, the D.C. Circuit found Port Cell's appeal to be premature. *See* paragraph 8. *supra*.

17. The next question we must address is whether the new Section 3512(b) applies to cases pending at the time of the October 1, 1995, general effective date of the PRA of 1995.<sup>19</sup> While the statute itself does not explicitly address this question, the legislative history does, and makes clear that the new Section 3512(b) applies to pending cases. Specifically, when the House of Representatives adopted the Conference Report on the PRA of 1995, Representative Crapo, the original sponsor of Section 3512(b), asked, "is it the chairman's understanding that section 3512 will become effective as of October 1, 1995, and will apply to all cases then pending before the Federal agencies or the courts?" Representative Clinger, the floor manager for the PRA of 1995 in the House, replied, "Mr. Speaker, the gentleman is absolutely correct. As of October 1, 1995, the defense provided in section 3512 is available at any time in an ongoing dispute."<sup>20</sup>

18. Northeast nevertheless argues that Section 3512(b) is not effective as to this case because Section 4(c) of the PRA of 1995 permits information collections already approved by OMB and displaying a valid OMB control number to remain in effect until the collection was renewed or revised.<sup>21</sup> On its face, this provision has nothing to do with the issue of whether a party in a pending case can now raise at any time in the proceeding an argument that the agency illegally imposed a penalty on it for failing to comply with an unapproved information collection. Northeast claims the firm financial commitment requirement has a current control number, and, therefore, pursuant to Section 4(c), the PRA of 1995 is not effective as to Port Cell's case. We fail to see how that relates to the question of whether Port Cell can argue now that the requirements lacked a valid OMB control number at the time Port Cell failed to comply with the rule. Surely an agency cannot penalize someone for violating an information collection that lacked OMB approval at the time the information submission was required but that got OMB approval later. The legislative history quoted above confirms that Congress intended Section 3512 to go into effect at the same time as the PRA of 1995 generally went into effect, and that it should apply to proceedings that are pending on the effective date.

19. Our decision here does not impermissibly retroactively apply Section 3512 to Port Cell's application. Section 3512 simply applies a new procedural or jurisdictional rule; it permits the defense that the PRA was violated be raised "at any time." Changes in

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<sup>19</sup> Pub. L. No. 104-13, § 4(a), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes ("Section 4(a)").

<sup>20</sup> 141 CONG. REC. H4376 (Apr. 6, 1995) (statements of Reps. Crapo and Clinger).

<sup>21</sup> Pub. L. No. 104-13, § 4(c), 109 Stat. 185 (1995), *reprinted in* 44 U.S.C.A. § 3501 Historical and Statutory Notes.

procedural or jurisdictional rules generally do not raise concerns about retroactivity. See Landgraf v. USI Film Products, 114 S. Ct. 1483, 1502 (1994). Even if Section 3512 raised concerns of retroactivity, because of the "clear evidence of congressional intent" that it "should apply to cases arising before its enactment," any potential concerns about impermissible retroactivity are eliminated. Id. at 1491-93, 1496. See also Scheidemann v. INS, 83 F.3d 1517, 1521 (3d Cir. 1996) ("a court may determine congressional intent [of retroactivity] . . . from the statute's legislative history."). Thus we conclude that Section 3512 may validly be applied to Port Cell.

20. We next consider whether Section 402(h) of the Communications Act, 47 U.S.C. § 402(h), or the court's remand in Northeast Cellular precludes our consideration of Port Cell's PRA arguments. The court vacated our waiver of the financial qualification requirements for Port Cell and remanded the proceeding to us, and Section 402(h) requires us to give effect to the court's mandate. We are not waiving the financial qualification requirements for cellular licensees in contravention of the court's mandate. Instead, we are considering whether the financial qualification requirement regulation is valid and enforceable under the PRA. Section 402(h) does not restrict us from doing so. In any event, Section 3512 of the PRA prevents Port Cell from being penalized "notwithstanding any other law," and permits Port Cell to raise a violation of the PRA "at any time during the administrative process or judicial action." It thus overrides any restriction Section 402(h) might place on our consideration of PRA issues in a proceeding on remand from a court.

21. We also reject Northeast's argument that we may not grant the relief sought by Port Cell because to do so would nullify the judgment of Northeast Cellular, contrary to the constitutional separation of powers doctrine articulated in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) ("Plaut"). In Plaut, the Supreme Court held unconstitutional Section 27A(b) of the Securities Exchange Act, 15 U.S.C. § 78aa-1(b), which required reinstatement of cases previously dismissed by the courts because the Congress retroactively commanded reopening final judgments. This case is fundamentally different. In Plaut, the judicial proceedings had been dismissed; there was no remand and continuing administrative proceeding that would be subject to further judicial review. Id. at 1451. Here, the judgment in Northeast Cellular vacated the Commission's waiver of financial qualification requirements and remanded the case to the agency for a further decision that could be judicially reviewed. Further administrative proceedings ensued, and the Commission's dismissal of Port Cell's application is still subject to judicial review. The statute addressed in Plaut by its terms applied to cases that were final. Section 3512 by its terms applies only to cases in which the administrative or judicial processes are still pending.

22. In sum, we conclude that Port Cell may properly raise the PRA issue and invoke the provisions of Section 3512.

**B. OMB Approval of Section 22.917(b)**

23. It is not disputed that the FCC had not obtained OMB approval for Section 22.917(b) at the time that Port Cell filed its application. Thus, unless no OMB approval was required, Port Cell cannot be penalized for its failure to comply with Section 22.917(b).

24. Section 22.917(b) required tentative cellular service selectees to provide us with evidence of a firm financial commitment. This requirement is an information collection under the PRA, yet no OMB approval was obtained for the version of Section 22.917(b) in effect before or at the time Port Cell's application was filed. In Dana and its progeny, we concluded that PRA review was required for financial qualification requirements in analogous regulations.<sup>22</sup> Similarly, Section 22.917(b) required PRA review by OMB. Northeast's arguments to the contrary lack merit. It does not matter that Section 22.917(b) was adopted in a rulemaking proceeding without notice and comment.<sup>23</sup> The PRA requires OMB clearance for all information collections, whether promulgated with or without a notice and comment rulemaking proceeding.<sup>24</sup> OMB's interpretations of the PRA, which are entitled to deference,<sup>25</sup> confirm that its "paperwork control functions necessarily extend to all reporting and recordkeeping requirements, however imposed."<sup>26</sup> Nor does Congress' use of the terms information collection "requests" and "requirements" in the 1980 PRA support Northeast's position. OMB's interpretation of the PRA confirms that the use of the terms "request" and "requirement" in the 1980 PRA was meant only to distinguish between information collections contained in notice and comment rulemaking proceedings, and all other

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<sup>22</sup> Dana Communications, Ltd., 7 FCC Rcd 1878 (1992) ("Dana") (PRA approval by OMB for former Section 22.917(c) governing financial showings required but not obtained); Kent S. Foster, 7 FCC Rcd 7971, 7972 (1992) ("Foster") (same); Fair Oaks Cellular Partners, 10 FCC Rcd 9980 (1995) ("Fair Oaks") (same).

<sup>23</sup> See Cellular Lottery Rulemaking, 59 R.R.2d 407, 415 n.37 (1985).

<sup>24</sup> 44 U.S.C. 3504(h) (OMB clearance required for information collections promulgated in notice and comment rulemaking proceedings); 44 U.S.C. 3507 (OMB clearance required for all other information collections); 5 C.F.R. §§ 1302.3, 1320.4(a) (1983) (OMB rules implementing the PRA, indicating review required for all information collections regardless of how promulgated).

<sup>25</sup> OMB's interpretation is entitled to deference, as Congress has vested it with oversight of the PRA. See 44 U.S.C. §§ 3503, 3504(c).

<sup>26</sup> Controlling Paperwork Burdens on the Public, 47 Fed. Reg. 39515, 39517 (1982) (decision on proposed rules implementing the 1980 PRA). See also id. at 39516 and 39519; Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13666, 13668, 13680, 13681 (1983) ("Final PRA Rules") (decision on final rules implementing 1980 PRA).

information collections, and that in either instance OMB clearance was required.<sup>27</sup> In sum, Section 22.917(b) required PRA review by OMB.

25. Port Cell's financial qualification submission failed to set out the terms of the loan commitment, or submit evidence of the lender's determination that it had assessed the credit worthiness of the loan applicant, as required by Section 22.917(b). Port Cell II, 6 FCC Rcd at 2283. Accordingly, its application was dismissed. Id. at 2283-84. At the time of Port Cell's application, the financial qualification information collection had not been submitted to OMB for approval, and had not received OMB clearance or an OMB control number. Under Section 3512(a), Port Cell cannot be penalized for failing to comply with Section 22.917(b). The dismissal of its application is the sort of "penalty" precluded by Section 3512. See 44 U.S.C. § 3502(14); 5 C.F.R. § 1320.3(j) (1995).

26. There is no merit to Northeast's argument that Port Cell cannot be deemed to have "failed to comply" with the information collection because it filed financial commitment information pursuant to Section 22.917(b). Port Cell's financial commitment filing was incomplete because it failed to provide all of the evidence required by the regulation. It "failed to comply" with the requirements of the information collection, and thus Section 3512 is available as a defense. We similarly interpreted Section 3512 in Dana, Foster, and Fair Oaks. In those proceedings, as in Port Cell's case, we failed to obtain OMB clearance for the financial qualifications information collection, and the applications were dismissed because the applicants made financial showings but failed to establish adequate firm financial commitments to fund their proposed operations. Based on Section 3512, we reinstated those applications. Port Cell is entitled to no less.

27. In sum, Section 22.917(b) required OMB approval under the PRA, but at the time of Port Cell's application, such approval had not been received. Port Cell cannot be penalized for failing to comply with the firm financial commitment requirements. Its application should thus not be dismissed for this reason.

### C. Port Cell's Qualifications

#### 1. *Financial Qualifications*

28. Pursuant to OMB's regulations implementing the PRA, Port Cell has submitted an amendment to the financial portion of its application. Where an information collection requirement lacks required OMB approval, we must permit the applicant to provide or satisfy

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<sup>27</sup> Final PRA Rules, 48 Fed. Reg. at 13676.

the legal conditions in any reasonable manner. 5 C.F.R. § 1320.5(b).<sup>28</sup> Northeast does not oppose the amendment or argue that it is insufficient. We accept Port Cell's amendment to its application, conclude that it meets the requirements of former Section 22.917(b), and find Port Cell to be financially qualified to be granted the license to serve the Portland NECMA.

## 2. *Ex Parte Allegations*

29. Northeast argues that Port Cell solicited an improper ex parte communication in violation of 47 C.F.R. § 1.1210, and thus is not qualified to be a licensee even if its application is reinstated and Port Cell is now found to meet the financial showing requirements. This allegation arises from Port Cell's correspondence with Senator William S. Cohen. On December 21, 1994, Port Cell's counsel wrote Senator Cohen to "bring to your attention a very troubling matter. . ."<sup>29</sup> After summarizing the facts of this case involving the PRA issue, the letter stated (*id.*):

The FCC's refusal to address the issue of PRA compliance is patently unfair to PortCell, which had a growing business valued at over \$30 million dollars, and which has operated in full compliance with FCC rules and policies. This is a clear case where an agency of the Federal government has ignored the intent of Congress in enacting the PRA. Furthermore, whatever questions the FCC might have had about PortCell's financial resources have been answered by its success as a growing concern over the last six years.

We would appreciate a chance to discuss this situation with you and will call your office to arrange a convenient time.

30. Attached to the letter was a "Fact Sheet" further elaborating on the facts of the case and concluding:

The FCC has thus terminated an operating business without confronting the question of whether such action is consistent with the PRA. In contrast to its actions in virtually every other

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<sup>28</sup> See also Fair Oaks, 10 FCC Rcd at 9982 & n.25; Foster, 7 FCC Rcd at 7972 n.10; Dana, 7 FCC Rcd at 1879.

<sup>29</sup> Letter from L. Andrew Tollin and William H. Boger to United States Senator William S. Cohen (Dec. 21, 1994).

case where it has discovered a PRA problem. PortCell has been forced off the air. The court has postponed PortCell's day in court indefinitely, leaving PortCell with little recourse but to seek Congressional help.

31. There is no indication that a meeting between Port Cell and Senator Cohen's office was ever arranged. Instead, on January 24, 1995, Senator Cohen forwarded Port Cell's letter to Chairman Hundt with a cover letter stating in part:

Because of my desire to be responsive to all inquiries and communications, I would appreciate your consideration of the enclosed letter. I am particularly interested in your focusing on [Port Cell's counsel's] question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.<sup>30</sup>

32. Senator Cohen also wrote to Port Cell indicating in pertinent part:

In order to be of assistance to your client [*i.e.*, Port Cell], I recently sent a letter to Reed Hundt, the Chairman of the FCC, to urge his prompt consideration of the matter, particularly focusing on your question as to whether the FCC complied with the Paperwork Reduction Act in adopting certain regulations.<sup>31</sup>

33. Because the letter from Senator Cohen to Chairman Hundt was not served on Northeast, and because it addressed the merits of the proceeding, it was an *ex parte* presentation. The Commission's Acting Secretary notified all parties of the correspondence, placed all of the correspondence in the public file, and informed the Senator that this was a restricted proceeding (in which *ex parte* presentations are prohibited).<sup>32</sup>

34. On July 12, 1996, the General Counsel and the Chief, Wireless Telecommunications Bureau, believing that further information regarding the circumstances of the correspondence might clarify matters, wrote to Port Cell seeking additional

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<sup>30</sup> Letter from Senator Cohen to Chairman Reed E. Hundt (Jan. 24, 1995).

<sup>31</sup> Letter from Senator Cohen to L. Andrew Tollin and William H. Boger (Jan. 27, 1995).

<sup>32</sup> Letter from Acting Secretary William F. Caton to Senator Cohen (Mar. 2, 1995). *See* 47 C.F.R. § 1.1208.

information on this issue.<sup>33</sup> Port Cell provided declarations by its attorneys and principals in response. These declarations stated in essence that Port Cell's principals had authorized the correspondence on the advice of counsel because Senator Cohen's committee would have jurisdiction over any legislation involving the PRA. Port Cell's attorney stated: ". . . I believed clarifying the remedial effect of the PRA through legislation was worth exploring."<sup>34</sup> They indicate that they intended to seek a meeting with Senator Cohen, deny that any other contacts with the Senator occurred, and state that they had no intention that Senator Cohen should intervene with the Commission or knowledge that he intended to do so.

35. Northeast asserts that Port Cell failed to answer completely the questions posed concerning contacts with Senator Cohen's office, leaving many questions unanswered. Northeast questions, for example, (1) why, if Port Cell intended to meet with Senator Cohen, no meeting was ever set up, and (2) why, after Port Cell discovered that Senator Cohen had contacted the Commission, it did not immediately notify the Commission and the other parties. Port Cell then provided further declarations from its principals and attorneys. These declarations indicate that during the holiday period Port Cell decided to let some time pass before following up its letter to Senator Cohen. The declarations also indicate that it did not serve Senator Cohen's letter on the other parties because it was not required to and that no harm was done because the Managing Director served the other parties.

36. The issue before us is whether Northeast has made a prima facie showing that Port Cell "solicited" or "encouraged" Senator Cohen to make an ex parte presentation to the Commission, in violation of 47 C.F.R. § 1.1210. and, in view of Port Cell's response, whether the evidence as a whole raises a substantial and material question of fact as to whether Port Cell solicited or encouraged such a presentation. See Astroline Communications Company, Limited Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (discussing the relevant standard). As Port Cell observes, the letter to Senator Cohen does not on its face ask the Senator to make a presentation to the Commission regarding Port Cell's application. Rather, it specifically asks for "a chance to discuss this situation with you." Sworn declarations by Port Cell's principals, who authorized the letter, and Port Cell's attorneys, who drafted it, confirm that the language quoted reflects their true intention in writing to the Senator -- to seek a meeting regarding Congressional help through legislation. There is no direct evidence before us tending to refute either the plain language of the letter or the sworn declarations of the principals. Moreover, although Senator Cohen's action in referring a constituent's inquiry to the relevant government agency might not be

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<sup>33</sup> Letter from General Counsel Kennard and Michele Farquhar, Chief, Wireless Telecommunications Bureau to L. Andrew Tollin (Jul. 12, 1996).

<sup>34</sup> Declaration of L. Andrew Tollin (Jul. 26, 1996) at ¶ 3.

wholly surprising in light of customary congressional practice, we cannot say that it is circumstantially improbable that a constituent asking for a meeting with an elected representative actually wants one, even if the constituent ultimately does not follow up on its desire for such a meeting. In addition, we agree with Port Cell that once it learned of Senator Cohen's letter, it was not required to serve the letter on the other parties. Nor was Port Cell required to notify the Commission of the letter.

37. This case, thus, differs from, for example, Elkhart Telephone Co., 11 FCC Rcd 1165 (1996), in which a party requested Senator Kassebaum to seek expedition of a Commission proceeding, but included with this request a draft letter from the Senator to the Commission addressing the merits. The presence of the draft letter provided specific support for the inference that the party intended to suggest to the Senator that such a letter be sent, although the party did not explicitly request the Senator to do so. Here, by contrast, there is no such specific support for the allegation that Port Cell's letter was intended to provoke Senator Cohen's presentation to the Commission. There is only the speculation that Port Cell's actions could be so interpreted. Mere speculation, however, is insufficient to raise a substantial and material question of fact. Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 772-73 (D.C. Cir. 1981); Fox Television Stations, Inc., 10 FCC Rcd 8452, 8512 ¶ 147 (1995), *recon. denied*, 11 FCC Rcd 7773 (1996).

38. That having been said, it would nevertheless be preferable for parties communicating with their representatives about pending restricted proceedings to specifically inform them of the restricted ex parte status of the proceeding and the prohibition on ex parte presentations, thereby avoiding even inadvertently instigating an inappropriate solicitation. We strongly advise that in the future parties follow this practice.

### 3. Abuse of Process Allegations

39. Northeast also challenges Port Cell's fitness to be a licensee based on allegations that Port Cell offered to withhold from the Commission information concerning Northeast's qualifications to be a licensee if Northeast would settle this proceeding. Port Cell wrote to Northeast indicating that Port Cell's lawyers had prepared a memorandum that was "very destructive of the ability of Northeast to qualify for the license." The memorandum concerned evidence intended to provide further support for Port Cell's allegations to the Commission that Northeast lacked reasonable assurance of the availability of its transmitter site. Port Cell stated that it had instructed its lawyers not to file the evidence at the time and instead suggested a meeting.<sup>35</sup> Northeast responded by informing Port Cell that "such threats

<sup>35</sup> Letter from John W. Connor to Timothy Hutchison (Sept. 19, 1991).

are inappropriate and contrary to Commission policy . . . ."<sup>36</sup> Port Cell subsequently filed the information with the Commission, and disclosed the correspondence. In Port Cell III, 8 FCC Rcd at 4149 n.18, the Commission denied the relief sought by Port Cell based on the information in question.

40. Abuse of process occurs when an improper threat is made to divulge information and invoke the Commission's processes unless another party accedes to some demands.<sup>37</sup> It does not include the "threat" implicit in any failed settlement negotiation that, in the absence of a settlement, litigation will continue.<sup>38</sup> Here, Port Cell merely indicated that it possessed evidence that would lead to successful litigation if no settlement was reached. This is more comparable to Spanish International,<sup>39</sup> where the parties simply indicated they would continue to litigate the pending case, than Gulf Coast, where a party made improper threats that were not "on any theory a legitimate part of the settlement negotiations."<sup>40</sup> We do not believe that Port Cell's behavior in the settlement context involved any improper threat, and it raises no substantial and material questions regarding Port Cell's qualifications.

41. Accordingly, for the reasons stated above, we find Port Cell fully qualified to be a licensee. We rescind the grant of the Block B Portland, Maine, cellular market to Northeast, and grant Port Cell's application.

#### D. Interim Operating Authority

42. When we rescinded Port Cell's original authorization, we granted it interim operating authority until Northeast was ready to begin providing service. Port Cell III, 8 FCC Rcd at 4152, *modifying Port Cell II*, 6 FCC Rcd at 2284 (originally granting interim

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<sup>36</sup> Letter from Timothy D. Hutchison to John W. Connor (Oct. 18, 1991), *attaching* letter from Alan Y. Naftalin to Timothy D. Hutchison (Oct. 18, 1991).

<sup>37</sup> *E.g.*, Gulf Coast Communications, Inc., 81 F.C.C. 2d 499, 513 (Rev. Bd. 1981) ("Gulf Coast"), *recon. denied*, 88 F.C.C.2d 1033 (Rev. Bd. 1981), *rev. denied*, FCC 82-168 (Apr. 16, 1982).

<sup>38</sup> Spanish International Communications Corp., 1 FCC Rcd 92, 95 n.1 (Rev. Bd. 1986) ("Spanish International") (subsequent history omitted).

<sup>39</sup> Id.

<sup>40</sup> Gulf Coast at 513.

operating authority for six months).<sup>41</sup> As we noted then, the public interest requires interim service in this case in order to maintain a healthy competitive market in Portland and to continue uninterrupted service to Northeast's customers. Port Cell II, 6 FCC Rcd at 2284. Port Cell asks that Northeast be allowed to continue service on an interim basis but cease service on ten days' notice from Port Cell that Port Cell will recommence operations. We believe this approach best serves the public interest. Accordingly, pursuant to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), we will grant Northeast interim operating authority and permit it to continue service until ten days after Port Cell notifies Northeast and the Commission that it is ready to recommence service.

#### **E. Northeast's Qualifications**

43. In light of our decision to reinstate and grant Port Cell's application, we need not address here the real-party-in-interest questions raised against Northeast. We will dismiss Port Cell's petition for reconsideration and related pleadings on this issue.

### **IV. ORDERING CLAUSES**

44. **IT IS ORDERED** that leave for Portland Cellular Partnership and Northeast Cellular Telephone Co., L.P., to file any unauthorized or unrequested pleadings in this proceedings **IS GRANTED**, and Portland Cellular Partnership's motion to strike **IS DENIED**.

45. **IT IS FURTHER ORDERED** that Northeast Cellular Telephone Company's license to construct and operate a cellular system on Frequency B in the domestic public cellular radio telecommunications service to serve Portland, Maine, **IS RESCINDED**.

46. **IT IS FURTHER ORDERED** that the application of Portland Cellular Partnership to operate the Portland, Maine, cellular system **IS REINSTATED NUNC PRO TUNC**, Portland Cellular Partnership's amendment **IS ACCEPTED**, and the application, as amended, **IS GRANTED**.

47. **IT IS FURTHER ORDERED** that Northeast Cellular Telephone Company, L.P., **IS GRANTED** interim operating authority to operate the Portland, Maine, cellular system until ten days after Portland Cellular Partnership serves notice on Northeast Cellular Telephone Company and the Commission that it is ready to re-commence operations.

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<sup>41</sup> See also, e.g., La Star Cellular Telephone Co. v. FCC, 899 F.2d 1233 (D.C. Cir. 1990)

48. IT IS FURTHER ORDERED that the Petition for Reconsideration, filed July 2, 1993, by Portland Cellular Partnership, and the Motion for Leave to File and Motion to Set Aside Grant and Designate for Hearing, filed March 10, 1994, by Portland Cellular Partnership, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary