

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

In the Matter of Application of)	
)	
PLAINCOM, INC.)	File No. 9507123
)	
To Provide 39 GHz Point-to-Point Microwave)	
Service in Waco, TX)	

ORDER ON RECONSIDERATION

Adopted: May 18, 2000

Released: May 22, 2000

By the Deputy Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order*, we deny a petition for reconsideration (Petition) filed by Astrolink Communications, Inc. (Astrolink)¹ of our denial² of a petition for reconsideration, filed by Plaincom, Inc. (Plaincom). Astrolink asks that we reverse our *Plaincom Order*, reinstate and grant the above-captioned application and related amendments to provide 39 GHz service in the Waco, Texas service area, and reinstate and grant Astrolink's application to provide 39 GHz service in the Austin, Texas service area.³

II. BACKGROUND

2. On September 9, 1994, the Telecommunications Industry Association (TIA) filed a petition for rule making seeking to increase the amount of spectrum available for operations contemplated in the 39 GHz band.⁴ On June 14, 1995, an application filed by Biztel, Inc. (Biztel) to provide 39 GHz service in the Waco, Texas area was placed on public notice.⁵ On June 28, 1995, an application filed by Astrolink to provide 39 GHz service in the Austin, Texas area was placed on public notice.⁶ On July 12,

¹Astrolink Communications, Inc., Petition for Reconsideration (filed Nov. 29, 1999) (Petition).

²Plaincom, Inc., *Order on Reconsideration*, DA 99-1816 (WTB PSPWD rel. Oct. 29, 1999) (*Plaincom Order*) *aff'd* Plaincom, Inc., *Memorandum Opinion and Order*, FCC 00-144 (rel. May 4, 2000)(*Plaincom MO&O*).

³Petition at 5-6.

⁴Telecommunications Industry Association, Fixed Point-to-Point Microwave Section, Petition for Rulemaking, RM 8553 (filed Sept. 9, 1994); *see also Public Notice*, Report No. 2044 (Dec. 1, 1994).

⁵FCC File No. 9505595 appeared on *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1139 (rel. June 14, 1995) (Biztel Application).

⁶FCC File No 9506290 appeared on *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1141 (rel. June 28, 1995) (Astrolink Application).

1995, Plaincom filed the above-captioned application to provide 39 GHz service in the Waco, Texas area.⁷

3. On November 13, 1995, pursuant to delegated authority, the Wireless Telecommunications Bureau ordered that, pending Commission action on the TIA rulemaking petition, no new 39 GHz applications would be accepted for filing, and any such applications received on or after such date would be returned as unacceptable for filing.⁸ On December 8, 1995, Plaincom submitted an amendment to its application, reducing the proposed service area (December Amendment).⁹ The amendment was accepted, but it failed to resolve the mutual exclusivity with the Astrolink and Biztel applications.

4. On December 15, 1995, the Commission initiated the rule making proceeding requested by TIA.¹⁰ The *NPRM and Order* provided, *inter alia*, that the following actions would be held in abeyance during the pendency of the rulemaking proceeding: (a) applications pending as of November 13, 1995, that were either mutually exclusive or still within the 60-day period for filing mutually exclusive applications;¹¹ (b) amendments to pending applications filed on or after November 13, 1995; and (c) applications for modifications of existing licenses filed on or after November 13, 1995.¹² On November 3, 1997, the Commission released new licensing and technical rules governing the use of the 39 GHz band.¹³

5. On February 6, 1998, Plaincom submitted a second amendment (February Amendment) to its initial application to modify its coordinates to reduce the size of its proposed service area.¹⁴ By letter

⁷*Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1145 (rel. July 26, 1995) (Plaincom Application).

⁸Petition for Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, RM-8553, *Order*, 11 FCC Rcd 1156, 1156 ¶ 2 (WTB 1995).

⁹Plaincom's original application specified the coordinates of its proposed Waco, TX service area as 30-45-00NLAT, 96-00-00WLONG/32-00-00NLAT, 98-00-00WLONG. On December 8, 1995 Plaincom amended its application and specified the new coordinates as 30-45-00NLAT, 96-20-00WLONG/32-00-00NLAT, 98-00-00WLONG.

¹⁰Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930, 4988-4989 ¶¶ 121-124 (*NPRM and Order*).

¹¹See 47 C.F.R. § 21.31(b)(2)(i) (1995). An application will be deemed mutually exclusive of an earlier-filed application if the two applications are mutually exclusive and the second application was filed either within sixty days after the date of the public notice listing the earlier application or one business day before the Commission acts on the earlier application, whichever is earlier. 47 C.F.R. § 21.31(b)(2) (1995).

¹²*NPRM and Order*, 11 FCC Rcd at 4989 ¶ 124 & n.197.

¹³Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600 (1997) (*Report and Order and Second NPRM*).

¹⁴The February Amendment requested a change in coordinates to 30-50-15NLAT, 92-20-00WLONG/32-00-00NLAT, 98-00-00WLONG.

dated September 22, 1998, the Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (Division), dismissed the February Amendment in accordance with the interim processing procedures for the 39 GHz service because the February Amendment was filed after December 15, 1995.¹⁵ On July 29, 1999, the Commission generally affirmed the decisions made in the *Report and Order and Second NPRM* with regard to the further processing of pending 39 GHz applications.¹⁶

6. On October 29, 1999, the Division denied Plaincom's petition for reconsideration of the dismissal of the February Amendment. Plaincom had argued, *inter alia*, that the December Amendment contained a clerical error, and that the February Amendment, which attempted to correct this error, was an amendment of right, effective upon filing.¹⁷ The Division determined, however, that the February Amendment was properly dismissed because it did not satisfy the requirements of Section 101.45(f) of the Commission's Rules,¹⁸ in that there was no evidence within the four corners of the December Amendment to indicate a clerical error existed.¹⁹ On November 23, 1999, we dismissed, *inter alia*, the Plaincom and Astrolink applications in accordance with the *July 1999 MO&O*.²⁰ On November 29, 1999, Astrolink requested reconsideration of the Division's *Plaincom Order*. On the same date, Plaincom filed an application for review of the Division's October 29, 1999 action.²¹ On March 4, 2000, the Commission upheld the Division's decision and denied Plaincom's Application for Review.²²

III. DISCUSSION

7. Section 1.106(b)(1) of the Commission's Rules provides that any non-party whose interests are adversely affected by any action taken by the Commission or by the designated authority may file a petition requesting reconsideration of the action taken, provided that the non-party shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible to participate in the earlier stages of the proceeding.²³ Astrolink surmises that the Division dismissed the Astrolink application in the *Dismissal Notice* based upon its decision in the *Plaincom Order* that the Astrolink application and the Plaincom application were mutually

¹⁵Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Mr. Ed Clinton, President, PLAINCOM, INC. (Sept. 22, 1998); *see also Public Notice*, Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 2008 (rel. Sept. 29, 1998).

¹⁶Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Memorandum Opinion and Order*, 14 FCC Rcd 12428 (*July 1999 MO&O*).

¹⁷*See Plaincom Order*, ¶ 5.

¹⁸47 C.F.R. § 101.45(f).

¹⁹*Plaincom Order*, ¶ 5.

²⁰*Public Notice*, 39 GHz Applications Dismissed, DA 99-2631 (WTB PSPWD rel. Nov. 23, 1999) (*Dismissal Notice*).

²¹Plaincom, *Application for Review* (filed Nov. 29, 1999).

²²*Plaincom MO&O*, ¶¶ 2-3.

²³47 C.F.R. § 1.106(b)(1).

exclusive as of December 15, 1995.²⁴ Astrolink therefore claims that it was adversely affected by the Division's decision set forth in the *Plaincom Order* not to accept the February Amendment. Astrolink argues that its participation in the earlier stages of this proceeding was not possible until the dismissal of the Astrolink application. It was at this point that Astrolink's interests were directly and immediately affected.²⁵ We find that Astrolink has established standing to seek reconsideration of the *Plaincom Order*.

8. Astrolink argues that the Division incorrectly concluded that Section 101.45(f)(5) of the Commission's Rules required dismissal of the February Amendment.²⁶ Section 101.45(f)(5) provides that amendments merely correcting typographical, transcription, or similar clerical errors, which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create any new frequency conflicts, are not considered to be newly filed applications.²⁷ Astrolink disputes the Division's conclusion that there was no evidence within the four corners of the December Amendment, either in the form of service area maps or conflicting coordinates, such that the Branch would have been alerted to a clerical error.²⁸ Astrolink argues that because Plaincom expressly stated that it was filing the December Amendment to resolve frequency conflicts with other pending applications, Commission staff should have recognized that Plaincom had made a clerical error when it became apparent that the December Application failed to achieve that purpose.²⁹

9. We disagree. Even with the change in coordinates found in the February Amendment, Plaincom's service area would have remained mutually exclusive with Biztel's application.³⁰ Therefore, the amendment that Plaincom stated in February 1998 that it had intended to make in December 1995 would have achieved the purpose of eliminating Plaincom's mutual exclusivity with the pending applications only in conjunction with amendments or dismissals by other applicants.³¹ Thus, it was not apparent from the face of the December Amendment that it contained an error. Moreover, as the Commission pointed out in the *July 1999 MO&O*, Section 101.45(f) "does not provide an applicant with a vested right to amend its application. Rather it provides an exception to the general rule that pending applications amended by major amendments are considered 'newly-filed' and lose their place in the

²⁴Petition at 1-3 citing *Dismissal Notice* at 13, dismissing the Astrolink Application. Astrolink notes that the *Dismissal Notice* did not state a specific reason for the dismissal of the Astrolink Application, but cited to the *Report and Order and Second NPRM*, wherein the Commission ordered that any mutually exclusive application pending as of December 14, 1995, would be dismissed. *Petition* at 2.

²⁵Petition at 2-3.

²⁶*Id.* at 3-5.

²⁷47 C.F.R. § 101.45(f)(5).

²⁸See *Petition* at 4-5, citing *Plaincom Order*, ¶ 5.

²⁹Petition at 4-5. Astrolink further argues that Commission staff bore responsibility for ensuring that the December Amendment achieved its stated purpose of removing mutual exclusivity because only the Commission staff had access to the database containing the pending 39 GHz applications. *Id.* at 4-5.

³⁰*Plaincom Order*, ¶ 5.

³¹For example, Biztel later dismissed its application. *Id.* at n.15.

processing line.”³²

10. As previously stated, the Commission affirmed the Division’s decision. Thus, the Astrolink and Plaincom applications were mutually exclusive on November 13, 1995, according the dismissal of Astrolink’s application was in accordance with the Commission’s 39 GHz application processing policy.³³

IV. CONCLUSION AND ORDERING CLAUSES

11. By this *Order on Reconsideration*, for the aforementioned reasons, we affirm the denial of Plaincom’s petition for reconsideration and deny Astrolink’s petition for reconsideration filed on November 29, 1999. In doing so, we deny Astrolink’s request for reinstatement and grant of Plaincom’s application to provide 39 GHz service in the Waco, Texas service area and Astrolink’s request for reinstatement and grant of its application to provide 39 GHz service in the Austin, Texas service area.

12. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Astrolink Communications, Inc., on November 29, 1999, is DENIED.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen O’Brien Ham
Deputy Chief,
Wireless Telecommunications Bureau

³²July 1999 MO&O, 14 FCC Rcd at 12446 ¶ 34.

³³See para. 4, *supra*.