

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

In the Matter of)	
)	
PACIFIC MICROWAVE JOINT VENTURE)	FCC File No. 0000041472
)	
Request for Waiver of Section 101.701(c) of the Commission's Rules)	
)	

ORDER

Adopted: June 28, 2000

Released: June 30, 2000

By the Chief, Public Safety & Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On November 17, 1999, Pacific Microwave Joint Venture (PMJV) filed an application for requesting Commission consent to the assignment of ten point-to-point common carrier microwave station licenses from Western Telecommunications, Inc. (Western) to PMJV.¹ PMJV's application includes a request for a waiver of Section 101.701(c) of the Commission's Rules, 47 C.F.R. § 101.701(c).² Section 101.701(c) of the Commission's Rules requires that at least fifty percent of the customers on a common carrier microwave system used primarily to relay broadcast television signals not be affiliated with the licensee, and that the usage by such customers constitute at least fifty percent of the licensee's service (the 50-50 affiliation requirement).³ For the reasons set forth herein, we deny the waiver request.

II. BACKGROUND

2. PMJV intends to use the subject point-to-point common carrier microwave systems currently owned by Western to relay broadcast television signals to various cable television systems in the areas of southern Oregon and northern California.⁴ PMJV requests a waiver of the 50-50 affiliation requirement

¹ See FCC File No. 0000041472 (filed Nov. 17, 1999). Pacific Microwave Joint Venture seeks assignment of the licenses for the following stations: KPN74 (Wolf Creek, Oregon), KPQ91 (Eugene, Oregon), KPQ92 (Cottage Grove, Oregon), KPQ99 (Ashland, Oregon), KPR20 (Keno, Oregon), KTG38 (Redding, California), KTG39 (Willow Creek, California), KTG46 (Dunsmuir, California), WMT382 (Medford, Oregon), and WPJD329 (Roseburg, Oregon).

² See FCC File No. 0000041472, Request for Waiver (filed Nov. 17, 1999) (Waiver Request).

³ 47 C.F.R. § 101.701(c).

⁴ *Id.* at 1.

because a large number of the current customers on the system will be affiliated with PMJV as of the completion of the proposed transaction.⁵

3. When the Commission established the 50-50 affiliation requirement, it determined that the development of common carriers serving the public should not be blocked or inhibited in the common carrier bands by the presence of persons serving principally their own businesses, given that there are other frequencies allocated for such activity.⁶ The Commission stressed that it was not in the public interest to allow persons serving principally their own businesses to “tak[e] up” common carrier frequencies.⁷ The Commission also stated that it would be inconsistent with the public interest to allow the common carrier bands to be utilized by those demonstrating no overall public need for use of the bands.⁸

III. DISCUSSION

4. To obtain a waiver of the Commission’s Rules, a petitioner must demonstrate either (a) that the underlying purpose of the rule would not be served or would be frustrated by application in the present case, and the grant of the requested waiver would be in the public interest; or (b) that, in view of the unique or unusual or unusual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁹

5. PMJV appears to suggest that a waiver will not compromise the purpose of the 50-50 affiliation requirement because the stations at issue provide video programming to cable systems in thinly populated areas which would not be of interest to a common carrier not affiliated with PMJV’s customers.¹⁰ We believe that a waiver will, indeed, compromise the purpose of the 50-50 affiliation requirement. The Commission specifically stressed that common carrier frequencies should not be used by persons serving principally their own business.¹¹ Grant of the requested waiver of the 50-50 affiliation requirement would enable PMJV to serve principally its own business on the common-carrier frequencies. We are concerned that such result potentially would inhibit development of common carriers using these frequencies to serve the public and PMJV has not demonstrated sufficiently that this is not a likely consequence. Thus, we believe that application of the rule to PMJV would serve the underlying purpose of Section 101.701(c) of the Commission’s Rules.

⁵ Waiver Request at 1.

⁶ Amendment of Parts 2, 21, 74, and 91 of the Commission’s Rules and Regulations Relative to the Licensing of Microwave Radio Stations Used to Relay Television Signals to Community Antenna Television Systems, *First Report and Order and Further Notice of Proposed Rulemaking*, Docket No. 15586, 1 FCC 2d 897, 901 ¶ 16 (1965) (*First R&O*).

⁷ *Id.*

⁸ *Id.*

⁹ 47 C.F.R. § 1.925(b)(3).

¹⁰ *See* Waiver Request at 1.

¹¹ *First R&O*, 1 FCC 2d at 901 ¶ 16.

6. Moreover, we are not persuaded that the population of the region, or the fact that the current path lengths cover significant distances, constitute unique or unusual circumstances warranting a waiver of the Commission's Rules. In fact, many common carrier microwave systems operate outside of large urban areas. As a result, the fact that path lengths cover significant distances, and thus would make conversion to Cable Antenna Relay Service (CARS) or Private Operational Fixed Point-to-Point Microwave Service (POFS) equipment costly, is not a circumstance unique to PMJV. Therefore, we are concerned that grant of a waiver in this case would in effect establish a policy of general applicability. We are "especially reluctant to grant a waiver when to do so would 'invite numerous other waiver requests which, if granted, would effectively circumvent the Commission's rulemaking function.'"¹² PMJV was, or should have been, aware that the 50-50 affiliation requirement existed and would apply to its acquisition of Western's stations. Consequently, we do not believe that application of the rule would be inequitable or unduly burdensome in this case. In addition, contrary to PMJV's statement that it would be in the public interest to grant the waiver because otherwise its customers would temporarily lose television signals, we believe that it is possible for PMJV to make the necessary conversions without its customers temporarily losing television signals.

7. We also find that PMJV has failed to demonstrate that there are no reasonable alternatives to utilizing common carrier frequencies to serve its own customers. PMJV contends that no other options exist to transmit the television signals if it is unable to use existing equipment.¹³ In this regard, it contends that conversion to CARS or POFS equipment is not an option because it would be prohibitively expensive and temporarily deprive its customers of television service. That these alternatives could cause PMJV to incur additional equipment costs is not, by itself, sufficient grounds for granting a waiver.¹⁴ Although PMJV may find it undesirable to expend additional funds to convert its system in order to comply with the Commission's Rules, we are not persuaded, based on the record before us, that converting to CARS or POFS is not a reasonable alternative.¹⁵ Further, we note that a conversion to CARS or POFS will afford PMJV the opportunity to upgrade a system that it has described as "old and specialized."¹⁶ Therefore, we believe that reasonable alternatives that are consistent with the Commission's Rules and in furtherance of the public interest are available to PMJV.

IV. CONCLUSION

8. Based on the record in this proceeding, we find that PMJV has failed to demonstrate that grant of a waiver of Section 101.701(c) of the Commission's Rules is warranted. PMJV's waiver request did not include a sufficient showing pursuant to Section 1.925(b)(3) of the Commission's Rules. Therefore, we deny PMJV's request for a waiver of Section 101.701(c).

¹² Nextel Communications, Inc., *Order*, 14 FCC Rcd 11678, 11691 ¶ 31 (WTB 1999) (quoting Verilink Corp, *Memorandum Opinion and Order*, 10 FCC Rcd 8914, 8916 ¶ 6 (1995), *review pending* (filed Aug. 20 1999)).

¹³ *See* Waiver Request at 1.

¹⁴ Country Cousins, Inc., *Order*, 14 FCC Rcd 19351, 19353 ¶ 6 (WTB PSPWD 1999); *see* Optel, Inc., *Order*, 14 FCC Rcd 3762, 3767 ¶ 12 (WTB 1999).

¹⁵ PMJV failed to present other alternatives, such as transmitting over a third party's facility.

¹⁶ Waiver Request at 1.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Waiver Request filed by Pacific Microwave Joint Venture on November 17, 1999, IS DENIED.

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

COMMISSION

FEDERAL COMMUNICATIONS

D'wana R. Terry
Chief, Public Safety & Private Wireless Division
Wireless Telecommunications Bureau