

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

In the Matter of Applications of)	
)	
COMMCO, L.L.C.)	FCC File Nos. 9600712, 9600713,
)	9600719, 9600720
For Licenses for 39 GHz Point-to-Point)	
Microwave Stations in Various Locations)	
Throughout the United States)	
)	FCC File Nos. 9600663, 9600664,
ERIC STERMAN)	9600669, 9600690,
)	
For Licenses for 39 GHz Point-to-Point)	
Microwave Stations in various locations)	
throughout the United States)	
)	
WINSTAR WIRELESS FIBER CORP.)	FCC File Nos. 9404193, 9404166
)	9404181, 9404182
For Licenses for 39 GHz Point-to-Point)	9404184
Microwave Radio Stations in Baltimore, MD, New)	
York, NY, Philadelphia, PA, Washington, D.C.)	
)	

ORDER ON RECONSIDERATION

Adopted: April 10, 2000

Released: April 12, 2000

Before the Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. The Public Safety and Private Wireless Division (Division) has before it two petitions for reconsideration (Petition) filed by Eric Serman (Serman) on October 14, 1999 and Commco, L.L.C. (Commco) on November 19, 1999.¹ Commco and Serman request reconsideration of Division orders dismissing the above-captioned applications for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band. Additionally, Commco, Plaincom, Inc. (Plaincom) and Serman (collectively Petitioners) request reconsideration of the partial grant of the above-captioned WinStar Wireless Fiber Corp. (WinStar) applications.²

2. We have analyzed the Petitions and find that the Commission staff properly decided the

¹ Commco Petition for Reconsideration (filed Nov. 19, 1999) (Commco Petition); Serman Petition for Reconsideration (filed October 14, 1999)(Serman Petition).

² Commco, Plaincom and Serman Petition for Reconsideration (filed Jan. 24, 2000)

matters raised. Therefore, we uphold the staff decisions for the reasons stated therein. There is no reason to disturb them.

3. Petitioners argue that the Division orders warrant review on reconsideration because the orders were contrary to *Ashbacker*.³ Commco states that the *Ashbacker*⁴ doctrine establishes that mutually exclusive applications are entitled to simultaneous consideration.⁵ However, Petitioners do not have *Ashbacker* rights because their applications are not mutually exclusive with WinStar's applications.⁶ As discussed in the Division orders and affirmed herein, Petitioners' applications were filed in response to a minor amendment, which did not open a new filing window, so their applications were therefore untimely.

4. In the 39 GHz point-to-point microwave service, competing applications were to be reviewed comparatively only if they were filed within "[s]ixty days after the date of the public notice listing the first of the conflicting applications as accepted for filing."⁷ "The purpose of these rules is to attract all competitive applications for a particular [frequency] within a fixed and reasonably short time frame, allowing the Commission to satisfy its *Ashbacker* obligations with a single, fairly prompt comparative hearing."⁸ Consequently, timely filers "have a legitimate expectation that the cut-off rules will be enforced."⁹ Thus, in the 39 GHz context, the *Ashbacker* doctrine requiring equal treatment of competing applications only applies if the applications were submitted within the applicable filing window. As affirmed above, no new filing window opened under the instant circumstances. Thus, Petitioners' applications were untimely and there was no mutual exclusivity. As a result, Petitioners have no *Ashbacker* rights, and the Division properly dismissed these applications.

5. With regard to the Commco applications, Commco asserts that the Division failed to comply with its obligations under Section 309(j)(6)(E) of the Communications Act of 1934, as amended¹⁰ to avoid mutually exclusivity in application and licensing proceeding. As noted above, mutually exclusivity did not exist between WinStar's and Commco's applications. Thus, this argument is without merit. Accordingly, the grants in part of the above-captioned WinStar applications are affirmed.

6. IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 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 Commco, L.L.C. on November 19, 1999 IS DENIED.

³ Commco Petition at 21-23; Sterman Petition at 22-23.

⁴ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

⁵ Commco Petition at 21; Sterman Petition at 22.

⁶ *Reuters Limited v. FCC*, 781 F.2d 946, 951 (D.C. Cir. 1986).

⁷ 47 C.F.R. § 21.31(b)(2)(i) (1994).

⁸ See *McElroy Electronics Corp. v. FCC*, 86 F.3d 248, 253 (D.C. Cir. 1996) citing *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 550 (D.C. Cir. 1992).

⁹ See *Florida Inst. of Tech. v. FCC*, 952 F.2d 548, 554 (D.C. Cir. 1992).

¹⁰ Commco Petition at 24.

7. 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), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Joint Petition for Reconsideration filed by Plaincom, Inc., Eric Sterman and Commco, L.L.C. on January 24, 2000 IS DENIED.

8. 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), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Eric Sterman on October 14, 1999 IS DENIED.

9. 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

Ramona E. Melson
Deputy Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau