

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

In the Matter of Applications of)
)
MOUNTAIN MICROWAVE, INC.) FCC File Nos. 0000348600, 0000348601
)
For Renewal of Licenses for Stations WPNE403)
(Eureka, California) and WPNE749 (Mount)
Lassen, California))

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2001

Released: October 2, 2001

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

I. INTRODUCTION

1. On April 16, 2001, TRW, Inc. (TRW) filed a petition requesting the denial of the above-captioned renewal applications filed by Mountain Microwave, Inc. (Mountain Microwave) on January 29, 2001. For the reasons set forth herein, we dismiss TRW’s petition to deny, treat the petition to deny as an informal objection, deny the informal objection, and grant Mountain Microwave’s above-captioned renewal applications.

II. BACKGROUND

2. In 1996, as part of its consolidation of the rules governing common carrier and private operational fixed microwave services, including the 39 GHz bands, in a newly established Part 101 of the Commission’s Rules, the Commission adopted a ten-year license term for all microwave services.¹ Prior to the *Part 101 R&O*, common carrier 39 GHz licensees were subject to a fixed term ending on February 1, 2001, while private carrier 39 GHz licensees had five-year license terms.²

3. In 1997, as part of the *39 GHz R&O*, the Commission adopted a renewal expectancy for licenses in the 39 GHz band,³ and adopted a significant change in the build-out requirements for the 39 GHz band. Prior to the *39 GHz R&O*, 39 GHz licensees were subject to a build-out requirement of

¹ Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, WT Docket No. 94-148, 11 FCC Rcd 13449 (1996) (*Part 101 R&O*).

² Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18620-21 ¶ 36 (1997) (*39 GHz R&O*).

³ *Id.* at 18626 ¶ 49.

constructing at least one link in its service area within eighteen months of the date of license grant,⁴ which the 39 GHz R&O changed to a requirement that the licensee demonstrate “substantial service” in its license area.⁵ In establishing this “substantial service” standard, the Commission intended to “ensur[e] that service is being provided to the public,”⁶ but wanted to provide licensees “a significant degree of flexibility in meeting their performance requirement.”⁷ In an effort to give licensees this flexibility, the Commission rejected defining specific build-out benchmarks as “unduly restrictive and burdensome.”⁸ The Commission did state, however, that one example of a substantial service showing might consist of four links per million population within a service area.⁹ The Commission specifically declined to exempt the incumbent 39 GHz licensees from this new “substantial service” renewal standard.¹⁰

4. On January 29, 2001, Mountain Microwave filed renewal applications for its 39 GHz band Stations WPNE403, Eureka, California and WPNE749, Mt. Lassen, California.¹¹ In accordance with Section 101.17 of the Commission’s Rules, Mountain Microwave attached its substantial service showing to the subject renewal applications.¹² Mountain Microwave’s applications were accepted for filing on February 7, 2001.¹³ Pursuant to Section 1.939 of the Commission’s Rules,¹⁴ the deadline for filing petitions to deny against Mountain Microwave’s applications was March 9, 2001. On March 29, 2001, TRW was granted a license for the Redding, California Economic Area (EA).¹⁵ On April 16, 2001, TRW filed its petition to deny against the subject applications.¹⁶ On May 8, 2001, Mountain Microwave filed an Opposition to the Petition to Deny.¹⁷ On May 18, 2001, TRW filed its Reply to the Opposition.¹⁸

⁴ See 47 C.F.R. § 101.63 (1996).

⁵ See 47 C.F.R. § 101.17.

⁶ 39 GHz R&O, 12 FCC Rcd at 18624 ¶ 46.

⁷ *Id.* at 18623 ¶ 42.

⁸ *Id.* at 18623-24 ¶ 43.

⁹ *Id.* at 18624-25 ¶ 46.

¹⁰ *Id.* at 18624 ¶ 46.

¹¹ See FCC File Nos. 0000348600 and 0000348601, filed January 29, 2001.

¹² See 47 C.F.R. § 101.17.

¹³ See Public Notice No. 769 (rel. Feb. 7, 2001).

¹⁴ 47 C.F.R. § 1.939.

¹⁵ See The Wireless Telecommunications Bureau Announces the Grant of 100 Wireless Licenses to Operate in the 38.6-40.0 GHz Band, *Public Notice*, 16 FCC Rcd 7195 (WTB 2001).

¹⁶ See TRW, Inc., Petition to Deny, filed April 16, 2001 (Petition).

¹⁷ See Mountain Microwave, Inc., Opposition to Petition to Deny, filed May 8, 2001 (Opposition).

¹⁸ See TRW, Inc., Reply to Opposition, filed May 18, 2001 (Reply).

III. DISCUSSION

5. TRW asks the Commission to accept its petition to deny on the merits, notwithstanding the fact that TRW filed its petition after the March 9, 2001 deadline.¹⁹ TRW argues that it could not have filed its petition prior to March 9, 2001 because, until TRW's application was granted, it lacked standing to file a petition to deny.²⁰ TRW argues that continued pendency of its 39 GHz band application during the period for filing a petition to deny against Mountain Microwave's application should not prevent TRW from raising "important public interest objections"²¹ On the merits, TRW argues that Mountain Microwave does not disclose the number of customers it serves.²² TRW further argues that Mountain Microwave has failed to provide a clear and expeditious accounting of spectrum as required by the Commission because its showings focus on potential system capacity.²³ Therefore, TRW states that we should require Mountain Microwave to provide additional information demonstrating the extent of its existing service to its customers before renewing the licenses of Mountain Microwave.²⁴ TRW further states that we should deny Mountain Microwave's renewal applications should Mountain Microwave fail to provide the information in a timely manner.²⁵

6. Mountain Microwave argues that TRW's petition should be dismissed as procedurally defective because it was untimely filed²⁶ and because TRW lacks standing to file such a petition.²⁷ In support of its argument that the petition was untimely, Mountain Microwave states that the deadline for filing a petition to deny was March 9, 2001 because Mountain Microwave's renewal application was accepted for filing on February 7, 2001. Mountain Microwave states that TRW's Petition was filed on April 16, 2001, five weeks after the March 9, 2001 deadline.²⁸ Mountain Microwave argues that "TRW may not claim extra rights with respect to Mountain's applications merely because its own applications were not processed as rapidly as it might have liked."²⁹ In support of its argument that TRW lacks standing to file a petition to deny, Mountain Microwave argues that TRW failed to demonstrate that the renewal of Mountain Microwave's licenses would cause any injury.³⁰ On the merits, Mountain Microwave

¹⁹ Petition at 1 n.1.

²⁰ *Id.* at 1 n.1, 2-3.

²¹ *Id.* at 3; Reply at 3-4.

²² Petition at 4.

²³ *Id.*

²⁴ *Id.* at 4-5; Reply at 1.

²⁵ Petition at 5.

²⁶ Opposition at 1-3.

²⁷ *Id.* at 3-5.

²⁸ *Id.* at 1.

²⁹ *Id.* at 2.

³⁰ *Id.* at 4.

argues that its substantial service showing satisfies Section 101.17 of the Commission's Rules.³¹ Mountain Microwave also argues that the "substantial service" standard requires an analysis of an applicant's coverage area, as opposed to the actual number of customers the applicant has.³²

7. In its Reply, TRW argues that it has standing to file a petition to deny because the rectangular service areas of the subject Mountain Microwave licenses overlap the Redding, California Economic Area (EA) in which TRW holds 39 GHz licenses.³³ Therefore, TRW argues that it must implement its facilities in a manner that protects Mountain Microwave from harmful interference if the subject renewal applications are granted.³⁴ TRW further argues that this requirement significantly restricts its Earth station siting options.³⁵

8. *Procedural Arguments.* While petitions to deny Mountain Microwave's renewal application were due on March 9, 2001, TRW did not file its petition to deny until April 16, 2001. TRW asks the Commission to accept the Petition, notwithstanding that it was not timely filed. A request for a rule waiver in the Wireless Telecommunications Services may be granted if it is shown that (a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (b) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.³⁶ Ordinarily, applicants cannot establish standing to protest Commission action adverse to their interests.³⁷ TRW acquired standing to file a petition to deny on March 29, 2001, when its license application for the Redding, California EA was granted. The Commission's Rules state that only a party in interest has standing to protest an application before the Commission.³⁸ In this case, we believe a waiver would be inconsistent with the underlying purposes of the rule, which is to allow for the orderly processing of applications while providing interested parties with the opportunity to challenge the grant of applications filed with the Commission. We believe that it would be unduly disruptive to our normal processing of license applications to allow persons to file otherwise untimely petitions to deny based on the timing of the disposition of a different application filed by the petitioner. We also conclude that a waiver under the second prong of the waiver standard is not justified because we do not consider the fact that TRW's application was granted after the deadline for filing petitions to deny to be a unique or unusual circumstance. Given the large number of applications filed with the Commission, it would not be unusual

³¹ *Id.* at 5-6.

³² *Id.* at 5-6.

³³ Reply at 4.

³⁴ *Id.*

³⁵ *Id.* at 4-5.

³⁶ 47 C.F.R. § 1.925(b)(3).

³⁷ See Application of KIRV Radio, *Memorandum Opinion and Order*, 50 FCC 2d 1010, 1010 ¶ 2 (1975) ("the claim of potential economic injury by a mere applicant for a broadcast facility is too remote and speculative to show standing as a 'party in interest'"); see also Application of Butte County Cellular License Corp., *Memorandum Opinion and Order*, 8 FCC Rcd 7894 (1993).

³⁸ See 47 C.F.R. § 1.106(b).

for a party who wishes to file a petition to deny to have its own application still pending before the Commission when the time frame for filing such petitions had run. Accordingly, we dismiss TRW's petition to deny. We note, however, that the Commission has allowed a party whose application was granted just prior to Commission action on a second application to file a post-grant petition for reconsideration of the second application because there was insufficient time for the party to file a pre-grant opposition.³⁹ Because under this rationale, TRW could arguably file a post-grant petition for reconsideration, we will consider the substance of TRW's pre-grant petition to deny as an informal objection pursuant to Section 1.41 of the Commission's Rules.⁴⁰

9. *Substantive Arguments.* We are not persuaded by TRW's arguments opposing Mountain Microwave's renewal applications. In its renewal applications, Mountain Microwave demonstrated that it had twelve links for Station WPNE403, in the area of Eureka, California, which contains a population of 240,350,⁴¹ and twelve links for Station WPNE749 in the area of Mt. Lassen, California, which contains a population of 304,501.⁴² Given the Commission's suggestion that the existence of four links per million population within a service area would constitute substantial service,⁴³ we find that Mountain Microwave has met the safe harbor standard and has demonstrated sufficiently that grant of renewal of its licenses is warranted under the circumstances presented. In light of the fact that Mountain Microwave clearly meets the safe harbor standard adopted by the Commission, which is phrased in terms of the number of links, we do not believe that it is necessary for us to delve into the number of Mountain Microwave's customers or the number of "equivalent T-1 lines" Mountain Microwave offers to customers, as TRW suggests. Accordingly, we will deny TRW's informal objection and grant Mountain Microwave's renewal applications.

IV. CONCLUSION

10. For the reasons stated above, we conclude that TRW's petition to deny should be dismissed as a petition to deny but considered as an informal objection. We conclude that TRW's objection lacks merit and find that Mountain Microwave has met the safe harbor standard and has demonstrated substantial service warranting renewal of its licenses. As a result, we will deny TRW's petition.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, the Petition to Deny filed by TRW, Inc. on April 16, 2001 IS DISMISSED as a petition to deny, and when considered as an informal objection, IS DENIED.

³⁹ See West Michigan Telecasters, Inc., *Memorandum Opinion and Order*, 11 FCC 2d 549, 549-50 ¶ 3 (1968).

⁴⁰ See 47 C.F.R. § 1.41.

⁴¹ FCC File No. 0000348600.

⁴² FCC File No. 0000348601.

⁴³ 39 GHz R&O, 12 FCC Rcd at 18624-25 ¶ 46.

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309(d), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, that the applications filed by Mountain Microwave, Inc. for renewal of the licenses for Stations WPNE403, Eureka, California and WPNE749, Mt. Lassen, California (FCC File Nos. 0000348600 and 0000348601) ARE GRANTED.

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

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Commission