

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

In the Matter of Applications of)	
)	
ADVANCED RADIO TELECOM CORP.)	FCC File No. 0000351002
)	
For Renewal of 39 GHz License for Station)	
WMK257, Altoona, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2001

Released: October 3, 2001

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

1. *Introduction.* The Public Safety and Private Wireless Division (Division) has before it a petition to deny (Petition) filed by David E. Beyerle (Mr. Beyerle) on March 9, 2001.¹ The Petition requests that the Division deny the above-captioned application requesting renewal of its authorizations to operate systems in the 38.6-40.0 GHz band (39 GHz band) filed by Advanced Radio Telecom Corp. (ART). For the reasons discussed below, we deny the Petition and grant ART's renewal application.

2. *Background.* In 1996, as part of its consolidation of the rules governing common carrier and private operational fixed microwave services, including the 39 GHz bands, the Commission established Part 101 of the commission's Rules and adopted a ten-year license term for all microwave services.² 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.³

3. In 1997, as part of the *39 GHz R&O*, the Commission adopted a renewal expectancy for licenses in the 39 GHz band,⁴ and changed the buildout requirements for the 39 GHz band licenses. Prior to the *39 GHz R&O*, 39 GHz licensees were subject to a buildout requirement of constructing at least one link in their respective geographic service areas within eighteen months of the date of license grant.⁵ As a result of the Commission's decisions in the 39 GHz R&O, a 39 GHz band licensee is required to demonstrate provision of "substantial service" in its license area in connection with its application for renewal of license.⁶ In establishing this "substantial service" standard, the Commission intended to "ensur[e] that service is being provided to the public,"⁷ but wanted to provide licensees "a significant

¹ Mr. Beyerle is a licensee of WPQR599, the BEA market area license surrounding WMK257.

² 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*, 11 FCC Rcd 13449 (1996) (*Part 101 R&O*).

³ 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*, 12 FCC Rcd 18600, 18620-18621 ¶ 36 (1997) (*39 GHz R&O*).

⁴ *Id.*, 12 FCC Rcd at 18626 ¶ 49.

⁵ See 47 C.F.R. § 101.63 (1996).

⁶ See 47 C.F.R. § 101.17.

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

degree of flexibility in meeting their performance requirement.”⁸ In an effort to give licensees this flexibility, the Commission rejected defining specific buildout benchmarks as “unduly restrictive and burdensome.”⁹ 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.¹⁰ The Commission specifically declined to exempt the incumbent 39 GHz band licensees from this new “substantial service” renewal standard.¹¹

4. On January 30, 2001, ART filed renewal applications for its 39 GHz band Stations WMK257, in Altoona, Pennsylvania.¹² In accordance with Section 101.17 of the Commission’s Rules, ART attached its substantial service showing to the subject renewal applications.¹³ ART’s application was accepted for filing on February 7, 2001.¹⁴ Pursuant to Section 1.939 of the Commission’s Rules,¹⁵ the deadline for filing petitions to deny against ART’s applications was March 9, 2001. Mr. Beyerle states that he attempted to file the Petition through the Universal Licensing System (ULS) on March 9, 2001, but was unable to do so.¹⁶ Mr. Beyerle represents that he asked a member of the ULS Technical Support staff how he could file the Petition, and he was allegedly told that he could send his documents via facsimile to the Commission’s Office of Public Affairs.¹⁷ He submitted his Petition via facsimile to the Commission’s Office of Public Affairs on March 9, 2001.¹⁸ On March 19, 2001, ART filed its Opposition to the Petition to Deny.¹⁹

5. *Discussion.* On our own motion, we waive the requirement in Section 1.939(b) of the Commission’s Rules²⁰ that petitions to deny be filed with the Office of the Secretary. While Section 1.939(b) of the Commission’s Rules allows petitions to deny in the Wireless Radio Services to be filed via ULS, ULS is not currently set up to accept petitions to deny.²¹ We note, as a general matter, that parties doing business before the Commission may not claim reliance on informal staff advice to excuse rule violations.²² In this case, however, based on the specific facts presented in this matter, particularly in

⁸ *Id.* at 18623 ¶ 42.

⁹ *Id.* at 18623-18624 ¶ 43.

¹⁰ *Id.* at 18624-18625 ¶ 46.

¹¹ *Id.* at 18624 ¶ 46.

¹² See FCC File No. 0000351002, filed January 30, 2001.

¹³ See 47 C.F.R. § 101.17.

¹⁴ See Public Notice No. 769 (rel. Feb. 7, 2001).

¹⁵ 47 C.F.R. § 1.939.

¹⁶ See Letter from David E. Beyerle to Magalie Roman Salas, Secretary, Federal Communications Commission (dated March 26, 2001).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Advanced Radio Telecom Corp., Opposition to Petition to Deny, filed March 19, 2001 (Opposition).

²⁰ 47 C.F.R. § 1.939(b).

²¹ See Public Notice, *Certain Actions Provided for in the Commission’s Rules Are Not Yet Available for Electronic Filing via the Universal Licensing System (ULS) and Must Be Filed Manually*, DA 01-1497 (rel. June 25, 2001).

²² See, e.g., Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4708 (1991) (“Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule.”); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2852 (1990), *aff’d sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) (“It is the obligation of interested parties to ascertain facts from official Commission

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light of the fact that our Rules allow for filing a petition to deny through ULS, such petitions could not be filed through ULS when Mr. Beyerle attempted to file his Petition, and the fact that we had not yet notified the public that certain filings currently cannot be made through ULS, we will waive the filing location requirement set forth in Section 1.939(b) of the Rules, and accept the Petition as being filed timely on March 9, 2001.²³ We remind petitioners, however, that until ULS is set up to accept petitions to deny, all petitions to deny must be filed with the Office of the Secretary. In the future, we reserve the discretion to reject untimely petitions where petitioners make unsuccessful efforts to file electronically, particularly since the public is now on notice that petitions to deny cannot be filed via ULS.

6. In his Petition, Mr. Beyerle avers that it is not clear that ART has demonstrated substantial service warranting renewal of the subject license. Mr. Beyerle asserts that in its renewal application, ART indicates that its deployment within the subject service area utilizes channels authorized under other of its call signs²⁴ and that this information should have no bearing on the sufficiency of ART's demonstration of substantial service regarding its request for renewal of the license for Station WMK257.²⁵

7. Upon reviewing the record in this matter, we believe that ART has provided the Commission with sufficient information and has successfully demonstrated the provision of substantial service in the Altoona area. In its renewal application for Station WMK257, ART demonstrated that it constructed two links in its service area which contains a population of 100,000, including one link which operates on frequencies licensed under Station WMK257. The Commission indicated that the construction and operation of four links per million population within a service area would be deemed a safe harbor standard in the 39 GHz band context and deemed to constitute substantial service.²⁶ We believe that licensees providing at least one link for each 250,000 people located within their service area are operating at the link-to-population ratio suggested by the Commission. ART has provided sufficient information to demonstrate that it has one link operating under the license for Station WMK257. Accordingly, we find that ART has adequately met the safe harbor standard set forth in the *39 GHz R&O* and has demonstrated substantial service in accordance with Section 101.17 of the Commission's Rules, thus warranting renewal of its license for Station WMK257.

8. 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) and 309(d), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, the Petition to Deny filed by David E. Beyerle on March 9, 2001, IS DENIED.

9. 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 application filed by Advanced Radio Telecom Corp. for renewal of the licenses for Stations WMK257, Altoona, Pennsylvania, (FCC File No. 0000351002) IS GRANTED.

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records and files and not rely on statements or informal opinions by the staff."); Hinton Telephone Company, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11637 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

²³ See Chris C. Hudgins, *Order on Reconsideration*, 16 FCC Rcd 7941, 7943 ¶ 7 (WTB PSPWD 2001).

²⁴ ART is a licensee of WPQV620, WPND799 and WPNE222.

²⁵ See Petition at 1.

²⁶ *39 GHz R&O*, 12 FCC Rcd at 18624-18625 ¶ 46.

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.

FEDERAL COMMUNICATIONS COMMISSION

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