

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

In the Matter of)
)
Superior Technologies, Inc.)
)
Paging and Radiotelephone Service Call Sign)
KNKD293 on the 152.84 MHz Channel at)
Manistique and Newberry, Michigan)

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 2001

Released: October 9, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. The Commercial Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau) has before it an Emergency Request for Relief (Request) filed by Superior Technologies, Inc. (Superior) on October 26, 1999. Superior seeks reconsideration of a determination by the Division's Licensing and Technical Analysis Branch (LTAB) that Superior has no authority under Paging and Radiotelephone Service Call Sign KNKD293 to operate facilities at Manistique and Newberry, Michigan.¹ For the reasons stated below, we deny Superior's Request.

2. On April 17, 1987, the former Mobile Services Division (MSD) of the Common Carrier Bureau² denied Superior's request for an extension of time to construct facilities at the Manistique and Newberry sites and accordingly terminated its authorization for those sites.³ In the *1999 Letter Ruling*, LTAB observed that Superior's authorization to operate the Manistique and Newberry sites was terminated in 1987 and directed Superior to cease operations. Despite acknowledging receipt of the *1987 Letter Ruling*, Superior argues that the ruling had no legal

¹ Letter dated September 27, 1999 from Roger Noel, Chief, Licensing and Technical Analysis Branch, to Timothy E. Welch, Esq., Counsel to Superior (*1999 Letter Ruling*). The Branch also found that Superior did not have authority to operate at Baraga, Iron River and Ishpeming, Michigan. *Id.* Superior's Request is limited to the Manistique and Newberry sites.

² The MSD became the Commercial Wireless Division in December, 1994.

³ See Letter dated April 17, 1987 from Kevin J. Kelley, Chief, Mobile Services Division, Common Carrier Bureau, to Timothy E. Welch, Esq., Counsel to Superior (*1987 Letter Ruling*). The *1987 Letter Ruling* was directed to Superior's predecessor-in-interest, Supercom, Inc.

effect because Superior did not have an opportunity to seek reconsideration.⁴ Superior does not explain how its ability to seek reconsideration was impaired. Indeed, Superior itself concedes that it received the *1987 Letter Ruling*,⁵ which specified Superior's right to seek reconsideration. Although captioned as an Emergency Request for Relief, the Request substantively is a belated petition for reconsideration. Superior cannot now blame the Commission for its failure to timely seek reconsideration of the *1987 Letter Ruling*.

3. Even assuming *arguendo* that Superior can at this late date contest the *1987 Letter Ruling*, its substantive arguments fail. Superior claims that the *1987 Letter Ruling* did not terminate its authority to operate the Manistique and Newberry sites because the Commission did not issue a formal public notice deleting these sites from its licensing database.⁶ Superior cites no Commission rule, policy or case that would have required the Commission to issue such a formal public notice, nor are we aware of any. Superior next argues that the authorization for Manistique and Newberry remained effective, notwithstanding the *1987 Letter Ruling*, because the sites remained on the licensing database. Superior claims that a Notice of Proposed Rulemaking (NPRM) stands for the proposition that an authorization remains effective until removed from the Commission's licensing database.⁷ The NPRM does not lend any support to Superior's argument. Rather, the NPRM provides that frequencies are unavailable for further *reassignment* until removed from the database.⁸ The infirmity of Superior's argument is further underscored by the fact that Commission rules have long provided that an authorization terminates automatically for failure to construct or provide service to the public for a specified period.⁹ Removal from the licensing database is not the *sine qua non* of a license termination. The fact that the Manistique and Newberry sites were not removed from the licensing database in 1987 does not vitiate the legal import of the *1987 Letter Ruling*.

4. As noted above, the Manistique and Newberry sites were not removed from the licensing database, as they should have been, in 1987. On April 14, 1997, Superior filed applications to modify these sites. On February 23, 1998, LTAB, unaware of the *1987 Letter Ruling*, issued a modified authorization for the Manistique and Newberry sites. Superior argues

⁴ Request at n.4.

⁵ *Id.* at 4.

⁶ *Id.* at 5.

⁷ *Id.*, citing Amendment of Part 90 of the Commission's Rules Concerning Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Notice of Proposed Rulemaking*, 5 FCC Rcd 6401 (1990).

⁸ *See* 5 FCC Rcd 6408 at n.15.

⁹ *See, e.g.*, 47 C.F.R. 90.155(a) (1991) (automatic termination for failure to construct and place into operation private land mobile station within 8 months from date of grant); 47 C.F.R. § 24.403(c) (1994) (automatic expiration of PCS license for failure to timely construct). *See also* 47 C.F.R. § 1.946(c) (1999) (automatic termination for failure to timely commence service, or meet coverage or substantial service requirements in each wireless radio service).

that LTAB's issuance of the modified authorization "constituted the Commission's final decision on the matter," superceding the *1987 Letter Ruling*.¹⁰ LTAB's issuance of the authorization in 1998 was void *ab initio* and does not bind the Commission. First, at the time it filed the modification application, Superior had no authority to operate at either site. Superior's application to modify these unauthorized sites therefore was defective. Second, LTAB had no authority to grant the application even if it were an application for two *new* sites because the Commission froze paging spectrum in 1996.¹¹ Had LTAB been cognizant of the *1987 Letter ruling*, it would not have granted the 1997-modification application. Courts have long recognized that administrative agencies may set aside agency action resulting from inadvertent, ministerial error.¹² LTAB's correction of the Commission's Universal Licensing Database in September 1999 to delete the Manistique and Newberry sites from Superior's authorization for Station KNKD293 therefore was proper.

5. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i) and 405, and Sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, the Request for Emergency Relief filed by Superior Technologies, Inc. on October 26, 1999 is denied.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
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¹⁰ Request at 3.

¹¹ See In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, and Implementation of Section 309 (j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 3108 (1996). The Commission suspended acceptance of new paging applications because of the proposed transition from site-by-site licensing to geographic area licensing for all paging services licensed on an exclusive, non-nationwide basis. The Commission continued to accept applications for fill-in sites. Fill-in sites include modifications of existing transmitter sites or additions of new transmitter sites that do not increase the licensee's interference contour. *Id.* at ¶140.

¹² See *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145-46 (1958) (correction of ICC certificate [trucking license]); *Chlorine Instit. v. OSHA*, 613 F.2d 120, 123 (5th Cir.) (correction of agency regulation), *cert. denied*, 449 U.S. 826 (1980). See also In re Application of Bell Atlantic-Pennsylvania, Inc., *Order*, 14 FCC Rcd. 13415 (Commercial Wireless Div., Policy and Rules Branch 1999) (set aside of license grant); *Interstate Broadcasting Co., Hearing Designation Order*, 2 FCC Rcd. 4051 (Audio Services Div. 1987) (set aside of license grant).