

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

In the Matter of Applications of)	
)	
COMMCO TECHNOLOGY, L.L.C.)	FCC File No. 0000352400
)	
For Renewal of 39 GHz License for Station)	
WPJC568, Pittsburgh, PA)	

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 2001

Released: November 7, 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 authorizations to operate systems in the 38.6-40.0 GHz band (39 GHz band) filed by Commco Technology, L.L.C. (Commco). For the reasons discussed below, we deny the Petition and grant Commco'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

¹ Mr. Beyerle is the licensee of 39 GHz band Station WPQR599, which operates in the Economic Area market surrounding WPJC568.

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.

“ensur[e] that service is being provided to the public,”⁷ but wanted to provide licensees “a significant 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 31, 2001, Commco filed a renewal application for its 39 GHz band Station WPJC568 in Pittsburgh, Pennsylvania.¹² In accordance with Section 101.17 of the Commission’s Rules, Commco attached its substantial service showing to the subject renewal applications.¹³ Commco’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 Commco’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, Commco filed its Opposition to the Petition to Deny.¹⁹

5. *Discussion.* On our own motion, in this limited instance, 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

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

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 Commco Technology, L.L.C., Debtor and Debtor-In-Possession, 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], (continued....)”)

matter, particularly in light of the fact that our Rules allow for filing a petition to deny through ULS, but such petitions could not be filed through ULS when Mr. Beyerle attempted to file his Petition. In addition, we note that we had not yet notified the public that certain filings currently cannot be made through ULS when Mr. Beyerle attempted to submit the Petition. Thus, we believe that grant of a waiver of the filing location requirement set forth in Section 1.939(b) of the Rules is warranted under the circumstances presented, 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.²⁴

6. We reject Commco's argument that Mr. Beyerle lacks standing to file his Petition.²⁵ To establish a party in interest standing, a petitioner must allege facts sufficient to demonstrate that grant of the subject applications would cause it to suffer a direct injury.²⁶ In addition, a petitioner must demonstrate a causal link "between the claimed injury and the challenged action."²⁷ To demonstrate a causal link, the petitioner must establish that: (1) "these injuries fairly can be traced to the challenged action,"²⁸ and (2) "the injury would be prevented or redressed by the relief requested."²⁹ Commco asserts that Mr. Beyerle has not demonstrated any injury. We disagree. The grant of the subject renewal licenses would have an adverse effect on Mr. Beyerle because Commco's rectangular service areas overlap the

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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 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 Commco also argues that the Petition is procedurally improper because Mr. Beyerle served the Petition on Commco by electronic mail without Commco's consent and because Mr. Beyerle allegedly did not sign the Petition. Opposition at 2-3. We decline to dismiss the Petition on these bases. While Commco is correct that 47 C.F.R. § 1.47(d) requires that documents be served in paper form, we decline to dismiss the Petition because Commco has not demonstrated any prejudice from the fact that it was served by electronic mail. As to Commco's second argument, Mr. Beyerle cured that deficiency when he signed the letter attached to the version of the Petition that he resubmitted to the Commission on March 26, 2001. The Commission has accepted unsigned pleadings that were later refiled with a signature. See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, *Order*, 16 FCC Rcd 7201, 7201-7202 n.3 (2001). In the absence of precedent supporting the dismissal for failure to sign a pleading, and in light of the absence of any prejudice to Commco, we are not inclined to dismiss Mr. Beyerle's Petition on that basis. We remind petitioners that unsigned pleadings may be stricken "and the matter may proceed as though the document had not been filed." 47 C.F.R. § 1.52. In the future, we reserve the discretion to strictly enforce the requirement of Section 1.52 of the Commission's Rules that all pleadings be signed at the time of filing.

²⁵ Opposition at 3-5.

²⁶ See AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) (*AT&T Wireless*) (citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 (1988)).

²⁷ *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72, 78 (1978)).

²⁸ *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3 (citing *Duke Power Co.*, 438 U.S. at 74).

²⁹ *Id.* (citing *Duke Power Co.*, 438 U.S. at 81).

Pittsburgh, Pennsylvania Economic Area in which Mr. Beyerle holds a license. Therefore, Mr. Beyerle would be adversely affected if we grant the renewal applications of Commco because it would have to limit its operations in order to protect the subject Commco station from interference. Accordingly, we find that Mr. Beyerle has standing to oppose the subject renewal application.

7. In his Petition, Mr. Beyerle avers that it is not clear that Commco has demonstrated substantial service warranting renewal of the subject license. In support of his claim, Mr. Beyerle asserts that Commco professes to serve only 0.01% of the population, that the four links that Commco constructed cover as little as 0.5% of the service area, and that any buildout in the identical service area pursuant to Commco's authorization under another call sign has no bearing on the sufficiency of Commco's demonstration of substantial service regarding its request for renewal of the license for Station WPJC568.

8. Upon reviewing the record in this matter, we believe that Commco has provided the Commission with sufficient information and has successfully demonstrated its provision of substantial service in the Pittsburgh area with respect to the requirements of Section 101.17 of the Commission's Rules.³⁰ In its renewal application for Station WPJC568, Commco demonstrated that it constructed four links in its service area which contains a population of approximately 858,000, and its substantial service showing for Station WPJC568 is license specific and is not combined with its substantial service showing for Station WPJC650. The Commission indicated that the construction and operation of four links per million population within a service area would be a safe harbor standard in the 39 GHz band context and deemed to constitute substantial service.³¹ We believe that licensees providing at least one link for every 250,000 people located within their service area are operating at the link-to-population ratio suggested by the Commission. Commco has provided sufficient information to demonstrate that its operations are consistent with the suggested link-to-population ratio. Accordingly, we find that Commco 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 WPJC568.

9. 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.

10. 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 Commco Technology, L.L.C. for renewal of the licenses for Stations WPJC568, Pittsburgh, Pennsylvania, (FCC File No. 00003524000) IS GRANTED.

³⁰ 47 C.F.R. § 101.17.

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

11. 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