

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

In the Matter of Applications of )
PACIFIC BELL WIRELESS LLC )
For Renewal of 39 GHz Service Stations )
WMT596, San Diego, CA, and WMT597, Las )
Vegas, NV ) File Nos. 0000338283, 0000338284

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 2003

Released: April 28, 2003

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

I. INTRODUCTION

1. On April 25, 2002, Pacific Bell Wireless, LLC (PBW) filed amended renewal applications for 39 GHz Service Stations WMT596, San Diego, California and WMT597, Las Vegas, Nevada. For the reasons set forth herein, we find that PBW has sufficiently demonstrated that it provided substantial service during its license term for both of these stations. We, therefore, find that grants of the subject license renewal applications are warranted under the circumstances presented. Accordingly, we grant PBW's amended renewal applications.

II. BACKGROUND

A. Microwave Licensing Framework

2. Prior to August of 1996, Point-to-Point microwave services were licensed under Part 21 of the Commission's Rules while Private Operational Fixed (POF) services were licensed under Part 94 of the Commission's Rules. Under Part 21, licenses were issued for a period up to ten years. Licensees who received authorizations under Part 21 received eighteen months to construct their facilities. In contrast, under Part 94, licenses generally were issued for a term of five years from the date of original issuance, modification, or renewal. Licensees who received authorizations under Part 94 received twelve months to construct their facilities.

1 See 47 C.F.R. § 21.45 (1995) (Point-to-Point Microwave Radio stations licenses issued for a period not to exceed 10 years). Unless otherwise specified by the Commission the expiration of regular Point-to-Point Microwave licenses was on February 1 in the year of expiration. Renewal of Licenses to Provide Microwave Service in the 38.6-40.0 GHz Band, Memorandum Opinion and Order, 17 FCC Rcd 4404, 4404 n.1 (2002) (Microwave Renewal MO&O).

2 See 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, WT Docket No. 94-148, Report and Order, 11 FCC Rcd 13449, 13463-4 ¶ 31 (Part 101 R&O).

3 See 47 C.F.R. § 94.39(a) (1995).

4 Part 101 R&O, 11 FCC Rcd at 13463-4 ¶ 31.

3. Effective August 1, 1996, the Commission consolidated the microwave licensing rules under Part 101 of the Commission's Rules. As a result of this consolidation, the Commission adopted a ten-year license term for all Part 101 licensees, including those for POF services, issued on or after August 1, 1996.<sup>5</sup> POF licenses issued before August 1, 1996 were subject to a fixed expiration date of February 1, 2001.<sup>6</sup> In addition, the Commission adopted an eighteen-month construction period for all Part 101 licenses.<sup>7</sup> As a result, Part 101 licensees were required to construct and place in operation each station authorized under Part 101 within eighteen months of the initial dates of their respective license grants.<sup>8</sup>

4. In 1997, the Commission adopted a renewal expectancy and modified the performance requirements for 39 GHz band microwave licensees.<sup>9</sup> Specifically, the Commission required 39 GHz band licensees to demonstrate "substantial service" in its license areas in connection with applications for license renewal.<sup>10</sup> The Commission sought to provide 39 GHz band licensees with a significant degree of flexibility in meeting this requirement, because it was concerned that an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings.<sup>11</sup> Although the Commission rejected several proposals as restrictive, burdensome and unnecessarily limiting licensees' service options,<sup>12</sup> the Commission provided a "safe harbor" example of a substantial service showing as "four links per million population within a service area."<sup>13</sup> Finally, the Commission noted, "any build-out standard should be based on market population or population density" because market size is a reasonable proxy for gauging the appropriate comparative levels of spectrum use.<sup>14</sup>

## B. PBW 39 GHz Renewal Applications

5. As reflected above, the authorizations of POF 39 GHz band licensees (issued before August 1, 1996) expired on February 1, 2001.<sup>15</sup> Renewal applications for these licenses were filed to be within ninety days of the end of the license term, but not later than thirty days prior thereto.

6. On January 22, 2001, PBW timely filed license renewal applications for the subject stations.<sup>16</sup> PBW failed, however, to include substantial service showings with the applications, as

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<sup>5</sup> See 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 Rulemaking*, 12 FCC Rcd 18600, 18620-18621 ¶ 36 (39 GHz R&O) (1997).

<sup>6</sup> *Id.*

<sup>7</sup> *Part 101 R&O*, 11 FCC Rcd at 13464 ¶ 33.

<sup>8</sup> See 47 C.F.R. § 101.63(a) (1996); See also *39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 39.

<sup>9</sup> See *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49.

<sup>10</sup> See 47 C.F.R. § 101.17.

<sup>11</sup> *39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42. The Commission determined that permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall.

<sup>12</sup> *Id.* at 18623-24 ¶¶ 43-45.

<sup>13</sup> *Id.* at 18624 ¶ 46.

<sup>14</sup> *Id.* at 18624 ¶ 44.

<sup>15</sup> *Microwave MO&O*, 17 FCC Rcd at 4406 ¶ 6.

required by the Commission's Rules.<sup>17</sup> As a result of this failure, on September 5, 2001 the Wireless Telecommunications Bureau dismissed PBW's license renewal applications.<sup>18</sup> On September 17, 2001, Cingular Wireless LLC (Cingular), on behalf of its affiliate, PBW, filed a reconsideration petition of the dismissal of PBW's license renewal applications for the above-captioned stations, seeking reinstatement of the licenses to PBW to operate the stations.<sup>19</sup> Cingular asserted that PBW does provide substantial service in the operation of the three subject stations, and provided data to support its assertion.<sup>20</sup> On October 1, 2001, Cingular amended the Reconsideration Petition, removing from its reconsideration request Stations WMT591 and WMT601, and limiting its request to Stations WMT596, WMT597, and WMT600.<sup>21</sup>

7. In a March 25, 2002 Order on Reconsideration, the Deputy Chief of the Division concluded that PBW's renewal applications should be reinstated.<sup>22</sup> In this *Order*, it was noted that while PBW's renewal applications were defective because they did not contain a substantial service showing, PBW's timely renewal applications should have been returned, pursuant to the Unified Policy, to provide PBW the opportunity to correct its omission.<sup>23</sup> Under the Unified Policy, applications that are defective, as a general matter, are subject to dismissal.<sup>24</sup> However, as an exception to this general principle, the Bureau will return for correction, rather than dismiss, timely filed renewal applications, where dismissal could result in expiration or termination of a license.<sup>25</sup> Following this exception, the *Order* reinstated PBW's renewal applications and directed the Branch to return the applications to PBW.<sup>26</sup>

8. On April 25, 2002, PBW filed amendments to their license renewal applications for Stations WMT596 and WMT597. Both amended filings contained substantial service showings.<sup>27</sup> With

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<sup>16</sup> See FCC File Nos. 0000338283, 0000338284, 0000338287.

<sup>17</sup> 47 C.F.R. § 101.17; See File Nos. 0000338283, 0000338284, 0000338287.

<sup>18</sup> See Universal Licensing System Automated Dismissal Letters, Reference Nos. 1060909, 1060910, 1060913 (dated Sept. 6, 2001).

<sup>19</sup> Cingular Wireless LLC Petition for Reconsideration (filed Sept. 17, 2001) Reconsideration Petition. See also 47 C.F.R. § 1.106(b)(1) (. . . any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken).

<sup>20</sup> *Id.* at Exhibit 1.

<sup>21</sup> In the Reconsideration Petition, Cingular requested reconsideration with respect to its renewal applications for Stations WMT591, WMT596, WMT597, WMT600, and WMT601. On October 1, 2001, Cingular amended its petition, limiting its reconsideration request to Stations WMT596, WMT597, and WMT600. Amendment to Petition of Reconsideration of License Renewal and Request for Reinstatement of 38 GHz Licenses Held by Pacific Bell Wireless, LLC (filed Oct. 1, 2001).

<sup>22</sup> Pacific Bell Wireless, LLC, *Order on Reconsideration*, 17 FCC Rcd 5659, 5661 ¶ 6 (2002) (*Order*).

<sup>23</sup> *Id.* See also Wireless Telecommunications Bureau Revises and Begins Phased Implementation of its Unified Policy for Reviewing License Applications and Pleadings, *Public Notice*, 14 FCC Rcd 11182 (WTB 1999) (*Unified Policy Public Notice*).

<sup>24</sup> *Unified Policy Public Notice*, 14 FCC Rcd at 11182.

<sup>25</sup> *Id.*

<sup>26</sup> *Order*, 17 FCC Rcd 5661 ¶ 6.

<sup>27</sup> File No. 0000338283, April 25, 2002 Amendment, Attachment III (WMT596 Substantial Service Showing); File No. 0000338284, April 25, 2002 Amendment, Attachment III (WMT597 Substantial Service Showing).

respect to Station WMT600, PBW requested cancellation of that license on April 26, 2002.<sup>28</sup> Accordingly, we will not give any further consideration to Station WMT600.

### III. DISCUSSION

9. Based on the record before us, we conclude that PBW has sufficiently demonstrated that Stations WMT596 and WMT597 provided substantial service during their prior license term. With respect to Station WMT597, PBW has demonstrated that it had thirteen operational links within a service area that contains a population of approximately one million people.<sup>29</sup> Given the Commission's view that the existence of four links per million population within a service area would satisfy the substantial service standard,<sup>30</sup> we find that PBW has met the substantial service standard for Station WMT597 and has otherwise demonstrated sufficiently that grant of renewal licenses for that station is warranted under the circumstances presented.

10. With respect to Station WMT596, although PBW had an almost six-year license term to operate that station,<sup>31</sup> it did not have a full six years to comply with the substantial service requirement. Given its license authorization date of February 27, 1995 and license expiration date of February 1, 2001, and the fact that the 39 GHz band substantial service rules took effect on April 7, 1998,<sup>32</sup> PBW had approximately thirty-four months to comply with the substantial service requirement. Thus, PBW had less than half of its full license term to satisfy the substantial service requirement. Accordingly, we will evaluate the amended renewal application for Station WMT596 in light of the reduced amount of time that PBW received to comply with the substantial service requirement.<sup>33</sup>

11. In the amended license renewal application, PBW demonstrated that it has five links for Station WMT596 for a service area that contains a population of approximately 2,000,000 people.<sup>34</sup> Hence, PBW is operating at approximately sixty-three percent of the Commission's safe harbor example of four links per million population.<sup>35</sup> Because the renewal application shows a level of service that does not meet the safe harbor, we must review the applicant's performance to determine whether the licensee has satisfied the substantial service standard. This review keeps in mind the Commission's desire to provide 39 GHz licensees with significant flexibility to allow the licensees to tailor their particular type of operation to satisfy the performance requirement.<sup>36</sup>

12. In the *Microwave Renewal MO&O*, the Commission held that the substantial service requirement was met by licensees who were operating at 50% or better of the Commission's safe harbor example and, in the thirty-four months which these licensees operated under the substantial service standard, had established viable operations, developed market plans, secured necessary financing, accommodated equipment manufacturers' production schedules and built a customer base in each market

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<sup>28</sup> File No. 0000865487 (filed Apr. 26, 2002, granted Apr. 28, 2002).

<sup>29</sup> WMT597 Substantial Service Showing.

<sup>30</sup> *39 GHz R&O*, 12 FCC Rcd at 18624-25 ¶ 46 (1997).

<sup>31</sup> The Licensing and Technical Analysis Branch of the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division granted PBW authorization to operate Station WMT596 on February 27, 1995.

<sup>32</sup> Service and Auction Rules for the 38.6-40.0 GHz Frequency Band, 63 Fed. Reg. 6079 (1998).

<sup>33</sup> *Microwave Renewal MO&O*, 17 FCC Rcd at 4406 ¶ 8.

<sup>34</sup> WMT596 Substantial Service Showing.

<sup>35</sup> See *Microwave Renewal MO&O*, 17 FCC Rcd at 4406-7 ¶¶ 8-10.

<sup>36</sup> *Id.*, ¶ 7.

providing services at a level of approximately one link per 125, 000 population.<sup>37</sup> The Commission said that “[t]his level of service in such a short time demonstrates that the licensees are using the spectrum to provide service.”<sup>38</sup>

13. In the instant case, the evidence shows PBW’s Station WMT596 operational level was clearly better than 50% of the Commission’s example of substantial service. Additionally, PBW invested approximately \$187,200 in equipment (radios and antennas), and installation and site acquisition in relation to Station WMT596 operations.<sup>39</sup> In the approximately thirty-four months that PBW operated under the substantial service requirement, we believe, consistent with the *Microwave Renewal MO&O*, that PBW established viable operations, provided substantial investment, and accommodated its equipment needs in the San Diego, California region. This level of effort in such a short time demonstrates that PBW is addressing the Commission’s concern that it use spectrum to provide service.<sup>40</sup> Thus, we believe that PBW has successfully demonstrated that it is providing substantial service through its operation of Station WMT596 and satisfies Section 101.17 of the Commission’s Rules. We conclude, therefore, that PBW has demonstrated sufficiently that grant of renewal license for Station WMT596 is warranted under the circumstances presented.<sup>41</sup>

#### IV. CONCLUSION AND ORDERING CLAUSES

14. Based upon our review of PBW’s amended renewal applications, we conclude that PBW has demonstrated sufficiently its provisions of substantial service for Stations WMT596 and WMT597 and that license renewals are warranted.

15. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 309, and Section 101.17 of the Commission’s Rules, 47 C.F.R. § 101.17, the applications for renewal of the licenses for 39 GHz Stations WMT596, San Diego, California (File No. 0000338283) and WMT597, Las Vegas, Nevada (File No. 0000338284), filed by Pacific Bell Wireless, LLC on January 22, 2001, as amended on April 25, 2002, be forwarded to the Licensing and Technical Analysis Branch of the Wireless Telecommunications Bureau’s Public Safety and Private Wireless Division FOR FURTHER PROCESSING.

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<sup>37</sup> *Id.*, ¶ 9.

<sup>38</sup> *Id.*

<sup>39</sup> WMT596 Substantial Service Showing.

<sup>40</sup> *39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 39. *See also Microwave Renewal MO&O*, 17 FCC Rcd at 4407 ¶ 10.

<sup>41</sup> Our decision with respect to Station WMT596 should not be viewed as a modification of the “safe harbor” example provided in the *39 GHz R&O*, but rather as recognition that the licensee received a significantly shorter period of time to comply with these standards. In developing the 39 GHz substantial service standards, the Commission envisioned a flexible substantial service standard that would be inclusive as opposed to exclusive. *See 39 GHz R&O*, 12 FCC Rcd at 18623, ¶ 42. As we have stated before, “[w]e believe that allowing licensees who received a truncated license term to demonstrate lower levels of service” than those licenses who receive a full license term in order to meet the substantial service standard “demonstrates this flexibility and is in accord with the underlying purpose of the substantial service standard . . . .” *Microwave Renewal MO&O*, 17 FCC Rcd at 4407 ¶ 12.

16. This action is taken under designated 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 Bureau