

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

In the Matter of Applications of)	
)	
WINSTAR WIRELESS FIBER CORP.)	File Nos. 0000347849, 0000351950,
)	0000346785, 0000346747, 0000347755,
For Renewal of Licenses to Provide Microwave)	0000346756, 0000347639, 0000348427,
Service In the 38.6 – 40.0 GHz Band)	0000345891, 0000348363, 0000351124,
)	0000346761, 0000346180, 0000346779,
)	0000352808, 0000347947, 0000348584,
)	0000346758, 0000346769, 0000347479,
)	0000351147, 0000346748, 0000346782,
)	0000348460, 0000346766

MEMORANDUM OPINION AND ORDER

Adopted: November 18, 2003

Released: November 28, 2003

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

I. INTRODUCTION

1. We have before us twenty-five renewal applications filed by Winstar Wireless Fiber Corp. (Winstar) for point-to-point microwave service and private operational fixed (POF) microwave service in the 38.6 – 40.0 GHz Band (39 GHz band). For the reasons discussed below, we grant Winstar’s above-captioned applications for renewal of the 39 GHz band licenses set forth in the attached Appendix.

II. BACKGROUND

A. Microwave Licensing Framework

2. Prior to August of 1996, point-to-point microwave services were licensed under Part 21 while POF services were licensed under Part 94 of the Commission’s Rules. Under Part 21, the Commission issued licenses for a period up to ten years.¹ Licensees who received authorizations under Part 21 received eighteen months to construct their facilities.² In contrast, under Part 94, generally, the Commission issued licenses for a term of five years from the date of original issuance, modification, or

¹ See 47 C.F.R. § 21.45 (1995) (point-to-point microwave radio station 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).

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*).

renewal.³ Licensees who received authorizations under Part 94 received twelve months to construct their facilities.⁴

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, 1996.⁵ POF licenses issued before August 1, 1996 were subject to a fixed expiration date of February 1, 2001.⁶ In addition, the Commission adopted an eighteen-month construction period for all Part 101 licenses.⁷ As a result, Part 101 licensees, including those licensees with a February 1, 2001 license expiration date, 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.⁸

4. In 1997, the Commission adopted a renewal expectancy and modified the performance requirements for 39 GHz band microwave licensees.⁹ Specifically, the Commission required 39 GHz band licensees to demonstrate "substantial service" in their license areas in connection with applications for license renewal.¹⁰ Although the Commission declined to exempt the incumbent 39 GHz band licensees from the "substantial service" renewal standard,¹¹ the Commission sought to provide 39 GHz band licensees with a significant degree of flexibility in meeting their performance requirement.¹² The Commission was concerned that an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz band licensees can provide.¹³ Thus, 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.¹⁴

5. The Commission also noted that licensees must receive a reasonable amount of time to establish a viable operation, develop market plans, secure necessary financing, develop and incorporate new technology in their systems, accommodate equipment manufacturers' production schedules and build a customer base to meet a performance requirement.¹⁵ Although the Commission rejected several proposals as restrictive, burdensome and unnecessarily limiting licensees' service options,¹⁶ the

³ See 47 C.F.R. § 94.39(a) (1995) (The Commission could issue a license with a shorter term of one to five years could be applied to permit the orderly scheduling of renewal applications).

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

⁵ 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 (1997) (*39 GHz R&O*).

⁶ *Id.*

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

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

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

¹⁰ See 47 C.F.R. § 101.17.

¹¹ See *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

¹² *Id.* at ¶ 42.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 18625 ¶ 47-48.

¹⁶ *Id.* at 18623-24 ¶ 43-45.

Commission provided a “safe harbor” example of a substantial service showing as “four links per million population within a service area.”¹⁷

B. 39 GHz Band Renewal Applications

6. The authorizations of POF 39 GHz band licensees issued before August 1, 1996 expired on February 1, 2001.¹⁸ On August 15, 2001, the Division granted 321 renewal applications filed by such licensees.¹⁹ In granting those applications, the Division concluded that the stations in question provided substantial service because the licensee operated at least one link for each 250,000 people located within its service area.²⁰

7. On March 7, 2002, the Division granted another 102 renewal applications for 39 GHz band licenses.²¹ In the *Renewal Grant Order*, the Division noted that, although the substantial service standard was based on a ten-year license term, licensees actually had less than one-third of a full ten-year license term to satisfy the substantial service requirement.²² We evaluated the substantial service submissions in light of the reduced amount of time that these licensees received to comply with the substantial service requirement. Our review of the applications focused on whether the licensees were developing the spectrum they had been assigned and using the spectrum to provide service to the public.²³ The applications granted resulted in two categories: (1) licensees operating at fifty percent or better of the Commission “safe harbor,” and (2) licensees demonstrating significant construction. With respect to licenses in the first category, we found that licensees established viable operations, developed market plans, secured needed financing, accommodated equipment manufacturers’ production schedules and built a customer base in each market providing service at a level of about one link per 500,000 population.²⁴ With respect to licensees in the second category, we indicated that those who constructed at least ten links within their service area during the course of the shortened period showed that they were making substantial use of the spectrum, as opposed to warehousing the spectrum. Moreover, we believed

¹⁷ *Id.* at 18624 ¶ 46. We note that, although the Commission did not use the exact words “safe harbor” in the 39 GHz band context, we believe the Commission intended for this example to serve as an example of a “safe harbor.” This determination is consistent with similar examples the Commission has provided to licensees in other services. Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16,934, 16951-2 ¶ 38 (2000); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-38 ¶ 70; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19,853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 – 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12,545, 12660-1 ¶ 270 (1997); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10,785, 10843-4 ¶ 113 (1997).

¹⁸ See note 8 *supra*.

¹⁹ See Wireless Telecommunications Service Grants 321 Renewals in the CF Radio Service, *Public Notice*, 16 FCC Rcd 15358 (WTB 2001) (*Renewal Grant Public Notice*).

²⁰ *Id.*

²¹ Renewal of Licenses to Provide Microwave Service In the 38.6 – 40.0 GHz Band, 17 FCC Rcd 4404 (WTB PSPWD 2002) (*Renewal Grant Order*).

²² *Id.* at 17 FCC Rcd 4406 ¶ 8.

²³ See 39 GHz R&O, 12 FCC Rcd at 18622 ¶ 39.

²⁴ *Renewal Grant Order*, 17 FCC Rcd at 4407 ¶ 10.

that, given the truncated license period to which they were subject, licensees operating ten or more links in their service area showed the provision of substantial service.²⁵

C. Winstar's Applications for Renewal

8. Winstar filed the twenty-five applications listed in the Appendix over the course of four days in January 2001. Winstar appended a ten-page attachment with each renewal application. For the most part, each attachment is identical and consists of a description of the company and its broadband network. Included therein is a description of a company-wide financial overview, the company's network (including Winstar's end-to-end network architecture, switching and data centers, building access rights, customer traffic on the network, network and customer support, and Winstar International), Winstar's services (voice, internet and data transport, web design and hosting, on-line business content and applications, application service provider, vertical solutions), advertising and sales information, and a description of its commitment to community service. With respect to each station for which it seeks renewal, each respective attachment provided estimated population and number of links in service as follows:

Call Sign	Market	Approximate Population ²⁶	Number of Links in Service
WPJE537	Rockford, Illinois	629,000	one
WMT603	Buffalo, New York	1,237,000	one
WMT604	Phoenix, Arizona	2,682,000	one
WMT672	Memphis, Tennessee	1,097,000	one
WMT817	Richmond, Virginia	1,043,000	one
WMT822	Norfolk, Virginia	1,714,000	one
WMW290	Raleigh-Durham, North Carolina	1,199,000	two
WPJC609	Jackson, Mississippi	507,000	one
WPJC613	Battle Creek, Michigan	1,182,000	one
WPJC615	Toledo, Ohio	839,000	one
WPJC617	Columbia, South Carolina	775,000	one
WPJC619	Poughkeepsie, New York	577,000	one
WPJD394	Greensboro, North Carolina	1,150,000	two
WPJC569	Norfolk, Virginia	1,714,000	one
WPJC572	Las Vegas, Nevada	1,058,000	one
WPJC577	Salt Lake City, Utah	1,430,000	two
WPJC578	Tampa, Florida	1,650,000	one
WPJD862	Poughkeepsie, New York	1,450,000	one
WPJD865	Rockford, Illinois	629,000	one
WPJE531	Poughkeepsie, New York	1,427,000	one
WPJE539	Wichita, Kansas	614,000	one
WMW520	Memphis, Tennessee	1,183,000	one
WMW521	Omaha, Nebraska	742,000	one
WMW861	New Orleans, Louisiana	1,518,000	one
WMW862	Richmond, Virginia	1,191,000	two

²⁵ *Id.* at ¶ 11.

²⁶ Differences in the approximate population numbers of the Poughkeepsie, New York market are due to differences in license coverage area.

In the description portion of each attachment, Winstar also provided identical information concerning the company as a whole. Winstar indicated that it took the following actions:

- Spent more than \$3.2 billion on capital expenditures in connection with the build out of Winstar's broadband network
- Hired over 4,700 employees to design, construct, operate, and market its wireless and wireline facilities, services, and products
- Deployed over 3,000 fixed wireless links, constructed over 200 operational hub sites, and deployed over thirty-five voice switches and 135 data switches
- Developed and deployed state-of-the-art point-to-multipoint equipment with Hughes Network Systems, P-Com, and Siemens
- Acquired 16,000 route miles of long-haul fiber and 6,000 route miles of intracity fiber networks throughout the U.S.
- Built seven regional data centers, three network operation control centers, and a national customer satisfaction center
- Established a significant Internet and e-business presence through the acquisition of networks and the development of key commercial products and service offerings, including Office.com, one of the leading business web sites
- Engaged in national marketing campaigns for Winstar services and products

9. Winstar also provided the following information detailing how the captioned stations have been incorporated within Winstar's national organization:

Table 1

Call Sign	Market	Branch(Division) Incorporated Into	Number of Employees (Location)
WPJE537	Rockford, Illinois	Chicago (North)	190 (Illinois)
WMT603	Buffalo, New York	New York Metro (North)	650 (New York)
WMT604	Phoenix, Arizona	Phoenix (West)	75 (Phoenix)
WMT672	Memphis, Tennessee	Atlanta (South)	5 (Tennessee)
WMT817	Richmond, Virginia	Washington-Baltimore (South)	2,000 (Virginia)
WMT822	Norfolk, Virginia	Washington-Baltimore (South)	2,000 (Virginia)
WMW290	Raleigh-Durham, North Carolina	Atlanta (South)	Not Provided
WPJC609	Jackson, Mississippi	Houston (South)	Not Provided
WPJC613	Battle Creek, Michigan	Detroit (North)	70 (Michigan)
WPJC615	Toledo, Ohio	Detroit (North)	260 (Ohio)
WPJC617	Columbia, South Carolina	Atlanta (South)	Not Provided
WPJC619	Poughkeepsie, New York	New York Metro (North)	650 (New York)
WPJD394	Greensboro, North Carolina	Atlanta (South)	Not Provided
WPJC569	Norfolk, Virginia	Washington-Baltimore (South)	2,000 (Virginia)
WPJC572	Las Vegas, Nevada	Los Angeles-Orange County (West)	Not Provided
WPJC577	Salt Lake City, Utah	Phoenix (West)	4 (Salt Lake City)
WPJC578	Tampa, Florida	Miami-Tampa-St. Petersburg (South)	45 (Florida)
WPJD862	Poughkeepsie, New York	New York Metro (North)	650 (New York)
WPJD865	Rockford, Illinois	Chicago (North)	190 (Illinois)
WPJE531	Poughkeepsie, New York	New York Metro (North)	650 (New York)
WPJE539	Wichita, Kansas	St. Louis-Kansas City (South)	Not Provided
WMW520	Memphis, Tennessee	Atlanta (South)	5 (Tennessee)
WMW521	Omaha, Nebraska	St. Louis-Kansas City (South)	Not Provided
WMW861	New Orleans, Louisiana	Houston (South)	Not Provided
WMW862	Richmond, Virginia	Washington-Baltimore (South)	2,000 (Virginia)

10. On May 13, 2002, the Division's Policy and Rules Branch, pursuant to Section 308(b) of the Communications Act of 1934, as amended,²⁷ directed Winstar to provide further information regarding twenty-four pending applications for renewal of stations in the Common Carrier Microwave Radio Service in order to determine if Winstar has provided substantial service for its stations.²⁸ Specifically, the Division directed Winstar to:

- 1) describe the competition existing in the market served by the stations for services that Winstar, through these stations, offers to customers in those markets;

²⁷ See 47 U.S.C. § 308(b).

²⁸ See Letter to Joseph M. Sandri, Jr. from John J. Schauble, Chief, Policy and Rules Branch, Public Safety and Private Wireless Division (PSPWD) (May 13, 2002) (*Section 308(b) Letter*). In requesting the information, the request was made for twenty-four stations listed in the Appendix, and one of the stations listed in the Appendix inadvertently was omitted from the letter.

- 2) state whether Winstar constructed any facilities for the stations during the license term that later were dismantled; and if so, the location of the facilities, the date the facilities were constructed and the date they were dismantled, and reason(s) the facilities were dismantled;
- 3) describe efforts Winstar has made to obtain customers in the market serviced by the stations during the license term; and
- 4) provide any other information specific to the market served by the stations which Winstar believed showed that Winstar provided substantial service during the last license term.²⁹

D. Winstar's Response to the 308(b) Letter

11. On June 12, 2002, Winstar responded to the request for information.³⁰ In responding, Winstar provided information concerning the twenty-five pending license renewal applications listed in the Division's letter and provided the requested information for another station's pending renewal application not listed in the *Section 308(b) Letter*.³¹ Winstar expressed its belief that it had provided substantial service regarding the twenty-five stations at issue.³² Winstar's response consisted of system-wide information and some station-specific information. Below, we analyze Winstar's specific responses to the four questions posed in the *308(b) Letter*.

12. *Existing competition in the market.* Winstar stated that, in each of the twenty-five markets at issue, it competes with the incumbent local exchange carrier ("ILEC") and, in many of the markets, it also competes with competitive local exchange carriers ("CLECs") and private line carriers.³³ Winstar said ILECs know, at a minimum, the identity of carriers operating in different areas due to ILEC-CLEC interconnection arrangements; but where Winstar does not operate its own switches, it does not have similar arrangements with other CLECs and, thus, cannot provide the Commission with a thorough response to the requested information beyond noting that Winstar competes with at least the ILEC in each market.³⁴ Winstar stated it operates its own switches in Phoenix and Tampa, and, thus, listed its CLEC competitors in those markets.³⁵ It also said it could not determine precisely which CLECs and other competitive providers currently provide which services in other markets.³⁶

13. *Construction of facilities during the license term that were later dismantled.* Winstar provided the following information regarding six stations.

²⁹ *Section 308(b) Letter* at 2.

³⁰ See Letter to Roberto Mussenden, PSPWD, from Brian Finkelstein, Chief Executive Officer (June 12, 2002) (*Winstar Response to 308(b) Letter*).

³¹ *Id.* at 1. In short, Winstar indicates it is providing information for the twenty-five stations listed in the Appendix.

³² *Id.*

³³ *Id.* at 2.

³⁴ *Id.*

³⁵ For the Phoenix market, Winstar lists Adelphia, AT&T, ELI, Qwest, Time Warner, and WorldCom; and for the Tampa market, it lists Adelphia, Allegiance, Teligent, US LEC, Verizon, and XO Communications. *Id.*

³⁶ Winstar indicates general awareness of the fixed service operations of XO Communications, Teligent, First Street (assets formed partially from the restructured Advanced Radio Telecom), and a number of unlicensed operators (such as Air2Lan, *etc.*). *Id.* at 2-3. Moreover, it says each State public utility commission maintains a list of certificated local exchange carriers in each state, each one theoretically being able to provide competition with Winstar. Further, Winstar sales teams, which have undergone substantial transformations as Winstar migrated into and out of Chapter 11, report CLEC competition existing in each of Winstar's markets from companies such as WorldCom, AT&T, Time Warner Telecom and XO Communications. *Id.* at 3.

- Stations WPJE537 and WPJD865: Leases at two locations were cancelled for services using both license channels, and thus, effectively dismantled April 2002. New leases were being negotiated, and operational links were expected to be restored in July 2002.
- Station WMT603: The original facilities were constructed in December 2000, at one specified address and decommissioned in May 2002, to re-engineer to expand the link to an additional facility. The reengineered facilities were scheduled to go on line later in June 2002, at two specified addresses.
- Station WPJC572: Facilities located at a specified address, constructed in April 1997, were dismantled two weeks prior to the *Winstar Response to 308(b) Letter* in relation to a building lease negotiation and were expected to be reinstalled later in June 2002.
- Station WPJC577: The facilities were moved from various specified locations to their current specified locations in May due to customer service issues.
- Station WMW862: The facilities were located at one set of specified locations since December 2000, and moved to another set of specified locations in May 2002.³⁷

14. Winstar also stated that with the exception of five stations (Stations WPJC609, WPJC615, WPJC617, WPJD394, and WPJE539) the rectangular service areas at issue have been reduced to a “sliver” shaped area due to Winstar’s holding of largely overlapping economic area (EA) licenses that it won in the intervening 39 GHz auction.³⁸ Thus, to conserve cash, in some cases, it might have allowed some leases to become inactive and equipment to be removed where excess equipment and leases existed and customer service disruption was not an issue.³⁹ Moreover, it said, service areas potentially affected are insignificant, size-wise, due to Winstar’s holding of the overlapping EA licenses, and its national sales force and national engineering operations can provide links in those areas if customer orders develop.⁴⁰

15. *Efforts made to obtain customers in the market serviced by the stations during the license term.* Winstar indicated it has sought to generate revenues by engaging in diligent sales efforts to secure customers by employing a specialized national sales team responsible for all markets, including those at issue. Winstar stated that it has engaged in national television and radio advertising campaigns, launched the Winstar Airship nationwide promotional tour from 2000 to 2001, marketed its fixed wireless services on its website and in a variety of other promotional brochures and materials.⁴¹ Winstar further said it has maintained sales forces, a national call center, engineering deployment and provisioning teams with subcontractors. Additionally, Winstar stated that, on December 19, 2001, IDT, Inc. purchased substantially all assets of Winstar Communications, Inc., and per a management agreement and other arrangements, operates the company. Winstar also indicated new marketing, sales, and other personnel had been added, and it still were actively marketing and providing its facilities-based broadband, switched and non-switched, local, long-distance, and private connectivity services.⁴²

16. *Other information intended to show provision of substantial service during the previous license term.* Winstar stated that, as described in its applications for renewal of its licenses, it had raised and invested significant capital to construct and operate an end-to-end facilities-based broadband

³⁷ *Id.* at 3.

³⁸ *Winstar Response to 308(b) Letter* at 3-4.

³⁹ *Id.* at 4.

⁴⁰ *Id.* Winstar notes that for the EA licenses, its substantial service showing is not required until 2010. *Id.* at n.2.

⁴¹ *Id.*

⁴² *Id.*

network. It contended that its investment in a national network combined with the facilities it has constructed in many of its licensed markets demonstrate substantial service warranting license renewal.⁴³

E. Winstar's Response to Request for Supplemental Information

17. On November 3, 2003, Winstar responded to a Commission staff request for supplemental information concerning its 39 GHz band license renewal applications that remained pending.⁴⁴ First, Winstar corrected its June 2002 letter to indicate that all of its twenty-five 39 GHz band license areas up for renewal at this time, not just twenty of the twenty-five, consist of the residual parts of rectangular service areas that are not covered by Winstar's overlapping EA authorizations.⁴⁵ The company provided a chart showing the population of those sliver-shaped residual areas and the number of links provided by Winstar throughout the rectangular service areas under which the slivers were originally licensed. That information is reproduced in pertinent part below:

⁴³ *Id.* at 1-2.

⁴⁴ Letter from Joseph M. Sandri, Jr., Senior Vice President and Regulatory Counsel, Winstar Communications, LLC, to Robert Mussenden, Federal Communications Commission, Nov. 3, 2003 (November 2003 Letter). Commission staff requested the additional information at an October 8, 2003, meeting with Winstar representatives.

⁴⁵ *Id.* at 1-2.

Table 2

Call Sign ⁴⁶	Market	Approximate Population of Residual “Sliver”	Links in Service Throughout Rectangular License Area
WPJE537	Rockford, Illinois	3,000	one
WPJD865	Rockford, Illinois	20,000	one
WMT603	Buffalo, New York	25,000	one
WMT604	Phoenix, Arizona	1,000	one
WMW520	Memphis, Tennessee	45,000	one
WMT672	Memphis, Tennessee	17,000	one
WMW862	Richmond, Virginia	45,000	two
WMT817	Richmond, Virginia	15,000	one
WPJC569	Norfolk, Virginia	8,500	one
WMT822	Norfolk, Virginia	8,500	one
WMW290	Raleigh-Durham, North Carolina	40,000	two
WPJC609	Jackson, Mississippi	11,000	one
WPJC613	Battle Creek, Michigan	20,000	one
WPJC615	Toledo, Ohio	less than ⁴⁷ 110,000	one
WPJC617	Columbia, South Carolina	43,000	one
WPJC619	Poughkeepsie, New York	8,000	one
WPJD862	Poughkeepsie, New York	3,500	one
WPJE531	Poughkeepsie, New York	3,500	one
WPJD394	Greensboro, North Carolina	16,000	two
WPJC572	Las Vegas, Nevada	5,000	one
WPJC577	Salt Lake City, Utah	100	two
WPJC578	Tampa, Florida	5,000	one
WPJE539	Wichita, Kansas	600	one
WMW521	Omaha, Nebraska	60,000	one
WMW861	New Orleans, Louisiana	30,000	one

III. DISCUSSION

18. We note, as an initial matter, that regardless of our disposition of this subject application, with respect to each of the licenses in question, Winstar would still be able to operate within most of the existing service area because it holds an overlapping EA license for most of the area in question. Thus, the pertinent question is whether Winstar should be allowed to continue operating in those “slivers” that are outside the service areas of the EA licensees. In making that determination, we believe it is appropriate to evaluate Winstar’s level of service relative to the population within those residual slivers. As noted above, the Commission has stated that four 39 GHz links per million population within a service area – or one link per 250,000 population – would qualify for “safe harbor” treatment denoting substantial service sufficient for renewal expectancy.⁴⁸ All of the Winstar sliver areas in question have populations far less than a quarter million. Thus, to the extent that Winstar is operating at least one link under each

⁴⁶ In the 39 GHz band, the Commission issued a separate license for one channel in a rectangular service area, and the service areas encompassing a given city were often of different sizes and only partially overlapping.

⁴⁷ Winstar says that 110,000 is the estimated Toledo RSA population. It says the sliver population is significantly less but that it has not been able to calculate it with precision. November 2003 Letter, Exhibit 1at 2.

⁴⁸ See note 17 and accompanying text.

license, we believe it has adequately demonstrated that it is providing substantial service under each license. This conclusion is consistent with our decision to grant those applications meeting the Commission's safe harbor and the *Renewal Grant Order's* flexible approach to substantial service.⁴⁹

19. Further, so long as Winstar demonstrates that a link is being operated under the authority of the license in question – i.e., that the link is located within the rectangular service area authorized by the original license – it should not be required to demonstrate that the individual link is physically located within the sliver. The Commission envisioned a flexible substantial service standard that would be inclusive as opposed to exclusive.⁵⁰ We have previously noted that provision of 39 GHz band wireless local loop services “changes constantly to accommodate the unique and varying demands of customers” and that such links are often provided as a temporary solution to precede deployment of optical fiber.⁵¹ Service providers often deploy such links in response to requests for service from specific customers, and later remove the wireless links once fiber is deployed. Thus, service providers use the 39 GHz band in a dynamic, customer-responsive fashion to meet service needs when they arise, and can quickly redeploy that equipment as customer needs evolve.

IV. CONCLUSION AND ORDERING CLAUSES

20. For the reasons set forth above, we conclude that Winstar has demonstrated, as required by Section 101.17 of the Commission's rules, 47 C.F.R. § 101.17, that it is providing substantial service in the markets that are the subject of the renewal applications listed in the Appendix.

21. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i) and 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) 308(b), and Section 101.17 of the Commission's Rules, 47 C.F.R. § 101.17, that the Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau SHALL PROCESS the applications for renewal in the common carrier microwave service contained in the Appendix to this *Memorandum Opinion and Order*.

22. 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 Bureau

⁴⁹ See *Renewal Grant Public Notice; Renewal Grant Order*, 17 FCC Rcd at 4406-07 ¶¶ 8-11.

⁵⁰ See *39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42.

⁵¹ Biztel, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 3308, 3310-3311 ¶¶ 6 -7 (WTB PSPWD 2003).

APPENDIX

<u>File No.</u>	<u>Call Sign</u>	<u>Location</u>
0000347849	WPJE537	Rockford, Illinois
0000351950	WMT603	Buffalo, New York
0000346785	WMT604	Phoenix, Arizona
0000346747	WMT672	Memphis, Tennessee
0000347755	WMT817	Richmond, Virginia
0000346756	WMT822	Norfolk, Virginia
0000347639	WMW290	Raleigh-Durham, North Carolina
0000348427	WPJC609	Jackson, Mississippi
0000345891	WPJC613	Battle Creek, Michigan
0000348363	WPJC615	Toledo, Ohio
0000351124	WPJC617	Columbia, South Carolina
0000346761	WPJC619	Poughkeepsie, New York
0000346180	WPJD394	Greensboro, North Carolina
0000346779	WPJC569	Norfolk, Virginia
0000352808	WPJC572	Las Vegas, Nevada
0000347947	WPJC577	Salt Lake City, Utah
0000348584	WPJC578	Tampa, Florida
0000346758	WPJD862	Poughkeepsie, New York
0000346769	WPJD865	Rockford, Illinois
0000347479	WPJE531	Poughkeepsie, New York
0000351147	WPJE539	Wichita, Kansas
0000346748	WMW520	Memphis, Tennessee
0000346782	WMW521	Omaha, Nebraska
0000348460	WMW861	New Orleans, Louisiana
0000346766	WMW862	Richmond, Virginia