

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

In the Matter of	)	
	)	
Application of ComScape Communications, Inc. and East Kentucky Network, LLC	)	File No.0003023125
	)	
For Consent to Assignment of License for Broadband PCS Station WPOK570, BTA474, Williamson, WV-Pikesville, KY	)	

MEMORANDUM OPINION AND ORDER

**Adopted: April 8, 2008**

**Released: April 8, 2008**

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

1. *Introduction.* In this Memorandum Opinion and Order, we address a Petition To Deny<sup>1</sup> filed on May 30, 2007, by Jeremiah P. Byrne (“Petitioner”) against an assignment application filed by ComScape Communications, Inc. (“CCI”) and East Kentucky Network, LLC (“East Kentucky”).<sup>2</sup> In the Application, CCI and East Kentucky (collectively, “the Applicants”) seek consent to the assignment of a wireless license<sup>3</sup> from CCI to East Kentucky. For the reasons stated below, we deny the Petition and order the assignment application to be processed in accordance with the applicable Commission rules.

2. *Background.* On May 10, 2007, the Applicants filed the Application pursuant to section 310(d) of the Communications Act of 1934, as amended. The Applicants seek Commission consent to the assignment of Broadband PCS Station WPOK570 from CCI to East Kentucky. The proposed transaction would increase the amount of spectrum held by East Kentucky in four Kentucky counties to 55 MHz, and authorize East Kentucky to operate in Mingo County, West Virginia for the first time, with 30 MHz of spectrum.<sup>4</sup>

3. CCI is a wholly-owned subsidiary of ComScape Holding, Inc. (“CHI”), which is a close corporation incorporated in accordance with the laws of the State of Ohio.<sup>5</sup> East Kentucky is a “small wireless telecommunications service provider that operates in rural and mountainous areas of Eastern Kentucky.”<sup>6</sup> According to the applicants, “[o]ver the last 18 years, the company and its predecessors (each of which was owned by the current owners of EKN) have developed an expertise in constructing

<sup>1</sup> Jeremiah P. Byrne Petition to Deny Application for Assignment of PCS License from ComScape Communications, Inc. to East Kentucky Network, LLC (filed May 30, 2007) (“Petition”).

<sup>2</sup> Universal Licensing System (“ULS”) File No. 0003023125 (“Application”). The application was filed on May 10, 2007, and amended on May 29, 2007, and October 4, 2007.

<sup>3</sup> Broadband Personal Communications Services (“PCS”) Station WPOK570, BTA474, Williamson, West Virginia–Pikeville, Kentucky.

<sup>4</sup> Application, Exhibit 1 at 1, Exhibit 2.

<sup>5</sup> Petition at 1; Opposition to Petition To Deny of ComScape Communications, Inc. at 3, Exhibit 5 (filed June 12, 2007) (“CCI Opposition”).

<sup>6</sup> Application, Exhibit 1 at 1.

wireless facilities and providing services to rural communities and along highways in the Appalachian Mountains.”<sup>7</sup>

4. As noted, on May 30, 2007, Jeremiah P. Byrne<sup>8</sup> filed the Petition objecting to the proposed assignment of license. Mr. Byrne contends that Mr. Ghanshyam C. Patel, who signed the application proposing to assign the license, was no longer the President and Chief Executive Officer of CCI as of August 7, 2006.<sup>9</sup> Further, the Petition states that Mr. Patel held no office or position of authority in CCI on May 8, 2007, when he signed a Purchase Agreement on behalf of CCI to assign the License from CCI to East Kentucky.<sup>10</sup> Petitioner states that Mr. Patel is challenging his removal in Florida and Ohio state courts and that Mr. Patel is also embroiled in pending litigation in Ohio regarding the disposal of “the sole CCI share certificate.”<sup>11</sup> Accordingly, the Petition asserts that Mr. Patel does not have the authority to assign the license from CCI to East Kentucky.<sup>12</sup>

5. On June 12, 2007, CCI and East Kentucky filed their respective Oppositions to the Petition.<sup>13</sup> Both CCI and East Kentucky assert that Mr. Byrne’s failure to provide service of the Petition on either of the parties to the assignment or their counsel renders it procedurally defective and should result in the Commission’s dismissal of the Petition.<sup>14</sup> East Kentucky also argues that Petitioner failed to make a prima facie showing “that a grant of the application would be inconsistent with the public interest, convenience and necessity” as required by section 1.939(d) of the Commission’s rules.<sup>15</sup> Further, East Kentucky states that Petitioner has failed to “demonstrate how consumers would be negatively impacted by grant of the application and assignment of the license.”<sup>16</sup>

6. Both CCI and East Kentucky argue that even if the Petition had been properly served, the underlying basis for the Petition is an ongoing private business matter and thus not a matter for Commission resolution, particularly when it is the subject of pending litigation.<sup>17</sup> Further, CCI asserts

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<sup>7</sup> *Id.*

<sup>8</sup> Mr. Byrne describes himself as “one of the Disclosable Interest Holders” and “the CCI CEO” as of the date (May 8, 2007) that a Purchase Agreement was entered into between Mr. Patel and East Kentucky for the license in question. Petition at 1-2.

<sup>9</sup> Petitioner asserts that the Board of Directors of CHI, the parent company of CCI, removed Mr. Patel from the office of President and Chief Executive Officer of CHI on August 7, 2006. *Id.* at 1.

<sup>10</sup> *Id.* at 2. Petitioner asserts that Mr. Byrne was the CCI CEO and Bhogilal Modi was CCI’s sole director at that time. *Id.*

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.*

<sup>13</sup> CCI Opposition; East Kentucky Network, LLC Opposition to Petition to Deny (filed June 12, 2007) (“East Kentucky Opposition”).

<sup>14</sup> CCI and East Kentucky assert that section 1.939 of the Commission’s rules requires a petitioner “to serve a copy of its petition to deny upon the applicant and on all other interested parties” and that section 1.47 of the Commission’s rules requires service to be provided “on or before the day on which the document is filed.” CCI Opposition at 1-2; *see* East Kentucky Opposition at 2. CCI and East Kentucky assert that neither the parties nor their counsel were properly served with the Petition. CCI Opposition at 2, East Kentucky Opposition at 2.

<sup>15</sup> East Kentucky Opposition at 3.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> CCI and East Kentucky indicate that the Petitioner’s commercial claims are the subject of pending litigation in three different state courts. East Kentucky Opposition at 2-3, CCI Opposition at 2, 4-5.

that the Petitioner is asking the “Commission to involve itself in an internecine dispute and in particular stop a transaction to help one side of the dispute favorably position itself regarding the proceeds of the sale.”<sup>18</sup> CCI describes the dispute as “a private matter that is not relevant to the public interest or to the Commission’s exercise of its authority under Section 310(d) of the Act.”<sup>19</sup> CCI argues that the Commission has “consistently refused to interject itself into private matters of this type, holding that such private disputes are best resolved in courts of competent jurisdiction.”<sup>20</sup> Finally, CCI argues that Mr. Patel was authorized to execute the assignment application on behalf of CCI and remains in a position of authority to validly enter into the assignment agreement with East Kentucky.<sup>21</sup>

7. *Discussion.* We find that the dispute in question constitutes a private matter that is not relevant to the Commission’s duty to determine whether the Applicants involved have demonstrated that the proposed assignment of licenses would serve the public interest, convenience, and necessity.<sup>22</sup> The arguments raised by Petitioner pertain to disputes of ownership and control of CCI. We believe that, in the instant case, a determination concerning whether the actions of Mr. Patel were within the scope of his employment is not necessary to our evaluation of whether the proposed assignment is in the public interest,<sup>23</sup> particularly when the scope of Mr. Patel’s employment is the subject of pending litigation in state court.<sup>24</sup>

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<sup>18</sup> CCI Opposition at 2.

<sup>19</sup> *Id.* at 2.

<sup>20</sup> *Id.* at 2-3.

<sup>21</sup> CCI asserts that “Mr. Patel has been the Chairman, CEO and President of ComScape as well as of its parent company ComScape Holding, Inc. (“CHI”) since the inception of each company.” CCI Opposition at 3. In support of the CCI Opposition, Mr. Patel filed a signed verification attesting that the contents of the Opposition are true and correct. *See* CCI Opposition, Verification of Ghanshyam C. Patel, dated June 11, 2007.

<sup>22</sup> 47 U.S.C. § 310(d).

<sup>23</sup> *See* Applications of Clarklift of San Jose, Inc. and Moore Material Handling Group, *Order on Reconsideration*, 15 FCC Rcd 4616 (WTB PSPWD 2000), *aff’d*, *Order on Further Reconsideration*, 16 FCC Rcd 920 (WTB PSPWD 2001), *aff’d*, *Second Order on Further Reconsideration*, 16 FCC Rcd 14844 (WTB 2001) (“*Clarklift*”). The *Clarklift* proceeding involved facts similar to the instant case. In that proceeding, the Commission was asked to determine whether the assignor’s office manager was authorized to sign the assignment application and the assignor sought to void the assignment on the grounds that the manager was not authorized to assign the license. The Commission said that the question of whether the office manager had actual or apparent authority to act on behalf of the corporation was an issue of state corporation or agency law and declined to issue a declaratory ruling to examine the assignment application in question. *See Clarklift Order on Reconsideration*, 15 FCC Rcd at 4618 ¶ 6, and *Order on Further Reconsideration*, 16 FCC Rcd at 924 ¶ 13. *See also* Applications of WWC Holding Co., Inc. and RCC Minnesota, Inc. For Consent to Assignment of Licenses, *Memorandum Opinion and Order*, 22 FCC Rcd. 6589, 6597 ¶ 16 (WTB 2007) (“*WWC Holdings*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Dkt. No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14033-34 ¶ 181 & n. 428 (2005); Application of Margaret Jackson (Transferor) and Ray Webb, *et al.*, For Consent to the Transfer of Control of Sunbelt Television, Inc., Licensees of KHIZ (TV), Barstow, California, *Memorandum Opinion and Order*, 18 FCC Rcd 26403, 26404 ¶ 6 (2003) (“*Sunbelt*”); Applications of Pueblo MSA Limited Partnership Station KNKN519 (MSA #241B), *Order*, 13 FCC Rcd 131, 133 ¶ 5 (WTB CWD 1997) (“*Pueblo*”).

<sup>24</sup> As stated above, the private dispute between Mr. Byrne and Mr. Patel is the subject of three different state court proceedings. *See* Petition at 1, East Kentucky Opposition at 2-3, CCI Opposition at 2, 4-5.

8. *Conclusion and Ordering Clauses.* We deny the Petition filed against the Application for failure to raise any issue that would warrant denying the Application.<sup>25</sup> As a result, we will process the Application in accordance with this Memorandum Opinion and Order and the applicable Commission Rules.

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), 309(d), and section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, the Petition to Deny filed by Jeremiah P. Byrne on May 30, 2007 IS DENIED for the reasons stated herein.

10. IT IS FURTHER ORDERED that, 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 1.948 of the Commission's Rules, 47 C.F.R. § 1.948, the above-captioned assignment application filed by ComScape Communications, Inc. and East Kentucky Network, LLC (ULS File No. 0003023125) shall be processed in accordance with this Order.

11. These actions are 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

Katherine M. Harris  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>25</sup> With respect to the arguments regarding Petitioner's failure to effect service of the Petition on the Applicants, we point out that, pursuant to section 1.939(c) of the Commission's Rules, a petitioner must serve a copy of its petition to deny on the applicant and on all other interested parties pursuant to Section 1.47. 47 C.F.R. § 1.939(c). Section 1.47 requires that such "service shall be made by that person or by his representative on or before the day on which the document is filed." 47 C.F.R. § 1.47(b). CCI and East Kentucky assert that no certificate of service was attached to the Petition and that neither they nor their respective counsels received a copy of the Petition. Petitioner has not proffered anything to rebut these assertions. In the absence of a showing of compliance with the procedural requirements pertaining to petitions to deny, the facts surrounding lack of service are undisputed and we must find that Petitioner has failed to follow the requirements of section 1.939 of the Commission's rules. *See, e.g.,* Application of Americom Network, Inc. For Transfer of Control of Licensee of 218-219 MHz Service Station KIVD0002, Frequency Segment B, New York, New York Metropolitan Statistical Area (MSA), *Memorandum Opinion and Order*, 16 FCC Rcd. 18450 (WTB PSPWD 2001). Both CCI, as the assignor, and East Kentucky, as the prospective assignee, were entitled to service of the Petition. In light of our resolution of the merits of the Petition, however, we do not dismiss the Petition as procedurally defective for failure to comply with the service requirement of section 1.939 of the Commission's Rules.