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

In the Matter of Application of	)	
	)	
Repeater Communications Corporation of	)	FCC File No. 0003736834
California for Partial Assignment of Licenses for	)	
Stations WPOM425 and WRW245 to the County	)	
of Monterey, California	)	

ORDER

Adopted: October 18, 2010 **Released: October 18, 2010**

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

1. In this order, we grant the application of Repeater Communications Corporation of California (Repeater) for authorization to assign Paging and Radiotelephone Service frequencies 152.030 MHz, 152.060 MHz, 152.150 MHz, and 152.180 MHz under call sign WPOM425 and frequency 152.090 MHz under call sign WRW245 to the County of Monterey, California (Monterey County).[1] We deny a petition to dismiss or deny the application—limited to frequencies 152.060 MHz, 152.150 MHz, and 152.180 MHz—filed by Paging Systems, Inc. (PSI), which holds overlay geographic-area licenses for those three frequencies under calls signs WPZG952, WPZG953, and WPZG954, respectively.[2] Finally, as part of our consent to the assignment from Repeater to Monterey County, we grant Monterey County's request for waiver of section 20.9(a)(6)[3] to enable it to use the frequencies for an interoperable public safety radio communications system rather than for commercial mobile radio service.[4]

2. We first address and reject PSI's request, filed on March 25, 2009, for a two-week extension of time to file its petition to deny.[5] Repeater's assignment application appeared on public notice as accepted for filing on March 11, 2009.[6] Petitions to deny were therefore due on March 25, 2009.[7] It is well established that the Commission will not routinely grant an extension of time.[8] We are not

[1] Repeater and Monterey County filed the assignment application, file No. 0003736834, on March 4, 2009. It appeared on public notice as accepted for filing on March 11, 2009. *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and *De Facto* Transfer Lease Applications, and Designated Entity Reportable Eligibility Event Applications Accepted for Filing, *Public Notice*, Report No. 4791, dated March 11, 2009 (*March 11, 2009 Accepted for Filing PN*).

[2] PSI filed its Petition to Dismiss or Deny on April 8, 2009. Repeater filed an Opposition on April 22, 2009 (Opposition). PSI filed a Reply on May 4, 2009.

[3] 47 C.F.R. § 20.9(a)(6).

[4] *See* Exhibit A to File No. 0003736834 (Waiver Request).

[5] Letter from Audrey Rasmussen to James Schlichting, Acting Chief, Wireless Telecommunications Bureau, dated March 25, 2009.

[6] *See March 11, 2009 Accepted for Filing PN*.

[7] *See* 47 C.F.R. § 1.948(j)(1)(iii) (Petitions to deny "must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.").

[8] *See* 47 C.F.R. § 1.46(a).

sympathetic to PSI's claim that it needed more time to file merely because it had only learned of the application's pendency on March 24, 2009. PSI offers no explanation why it took it almost two full weeks from the date of public notice to learn of the proposed assignment. Nevertheless, we find that the public interest is served by consideration of the central issue raised by PSI—*i.e.*, whether Repeater has the necessary authority to assign three of the frequencies. We will therefore treat the petition as an informal request for action under section 1.41 of the Commission's rules.[9] We now turn to the petition's merits.

3. As noted above, PSI holds overlay geographic-area licenses for three of the frequencies, 152.060 MHz, 152.150 MHz, and 152.180 MHz, that Repeater proposes to assign to Monterey County. PSI argues that under applicable Commission rules, Repeater's authority for the three frequencies terminated and it therefore cannot assign what it does not have to Monterey County.[10]

4. Under section 1.955(a)(3) of the Commission's rules, "[a]uthorizations automatically terminate, without specific Commission action, if service is *permanently discontinued.*"[11] Section 1.955(a)(3) further provides that "[t]he Commission authorization or the individual service rules govern the definition of permanent discontinuance for purposes of this section."[12] Section 22.317, which applies here, provides that a "station that has not provided *service to subscribers* for 90 continuous days is considered to have been permanently discontinued . . . ."[13] As explained below, the record before us does not, as PSI asserts, demonstrate that Repeater failed to provide service for 90 continuous days on any of the three frequencies.

5. In support of its Petition, PSI first offered a declaration of David Kling (Kling), a Touch Tel Corp. systems engineer, dated April 7, 2009. Kling states that since 2002-2003, Touch Tel "regularly" and "periodically" monitored frequencies 152.060 MHz, 152.150 MHz, and 152.180 MHz on behalf of PSI and detected no emissions from Mt. Toro, where station WPOM425 is licensed to operate.[14] In a declaration dated April 29, 2009, Kling elaborated that he monitored the frequencies "many times in the past" using both mobile and fixed monitoring techniques.[15] Repeater responds that it did not discontinue operation on any of the frequencies for more than 90 continuous days during that period, and argues that under applicable Commission precedent Kling's monitoring evidence is legally insufficient.[16]

6. We find that because PSI's claim of permanent discontinuance is founded principally on its allegation that Repeater was not providing service on the authorized frequencies, it must be supported by continuous, not intermittent, monitoring.[17] Touch Tel's sporadic monitoring from an unspecified date in

[9] 47 C.F.R. § 1.41. *See also* Petition at note 1 (requesting alternative treatment of the petition under section 1.41).

[10] Petition at 2.

[11] 47 C.F.R. § 1.955(a)(3) (emphasis added). Section 1.955(a)(3) also requires licensees to "notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation." *Id.* We note that an authorization automatically terminates if service is permanently discontinued, even if a licensee fails to file the required form requesting license cancellation.

[12] 47 C.F.R. § 1.955(a)(3).

[13] 47 C.F.R. § 22.317 (emphasis added).

[14] *See* Declaration attached to PSI Petition, dated April 7, 2009.

[15] *See* Declaration attached to PSI's Reply to Opposition to Petition to Dismiss or Deny, dated May 4, 2009.

[16] Letter from Elizabeth R. Sachs to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated May 14, 2010.

[17] *See* National Ready Mixed Concrete Co., *Memorandum Opinion and Order*, 23 FCC Rcd 5250 at ¶ 11 (2008) ("a claim of permanent discontinuance of operations that relies materially on the complainant's contention that the licensee has not been heard on the authorized frequencies must, under Commission precedent, be supported by continuous monitoring"). *See also* University of Southern California, *Memorandum Opinion and Order*, 16 FCC Rcd 2978, 2982 ¶ 11 (WTB 2001) (sporadic monitoring of a channel does not make a *prima facie* case that a licensee has permanently discontinued operations).

2002 to April 2009 falls short of what is required to demonstrate permanent discontinuance of operation under the facts before us. We emphasize that the record shows that Touch Tel did not monitor any of the three frequencies for 90 continuous days during that period. PSI submitted no further monitoring evidence regarding frequency 152.150 MHz

7. In January 2010, PSI submitted two additional declarations in which Kling states that Touch Tel continuously monitored frequencies 152.060 MHz and 152.180 MHz from September 8 to December 9, 2009 (a 93-day period), and had detected no transmissions.[18] In response to Kling's declarations, Repeater submitted detailed documentation regarding the provision of service on frequencies 152.060 MHz and 152.180 MHz during the 93-day period, including a certified statement (under penalty of perjury) of James Lacalamita, the president of Monterey-Carmel Communications Corporation dba Peninsula Communications (Peninsula), dated January 13, 2010.[19]

8. Lacalamita states that Peninsula rented two-way radios programmed to operate on frequencies 152.060 MHz and 152.180 MHz during the 93-day period.[20] Invoices attached to Lacalamita's declaration show that Peninsula rented radios to a fire academy and to a pest control service, which were assigned frequencies 152.060 MHz and 152.180 MHz, respectively.[21] The fire academy's radios included two channels; each channel used two frequencies, one for reception (RX) and one for transmission (TX): channel 1, RX 152.090 MHz, TX 158.550 MHz, and channel 2, RX 152.060 MHz, TX 158.520 MHz.[22] The pest control service's radios likewise had two channels with two frequencies: channel 1, RX 152.150 MHz, TX 158.610 MHz, and channel 2, RX 152.180 MHz, TX 158.640 MHz.[23] In addition, Repeater submitted separate letters signed by representatives of the pest control service and the fire academy stating they used the radios during the 93-day period.[24]

9. PSI urges us to disregard Lacalamita's declaration and the supporting documentation, claiming they do not show the provision of service on frequencies 152.060 MHz and 152.180 MHz during the 93-day period monitored by Touch Tel.[25] Kling, however, cogently explains why Touch Tel may not have heard transmissions on the two particular frequencies. In a declaration dated May 18, 2010, Kling emphasizes that frequencies 152.060 MHz and 152.180 MHz were programmed to radio channel 2, and states that if a "customer has good communications on channel 1, there is no reason for them to use a secondary channel 2."[26] We find that PSI's supplemental monitoring is inconclusive and has not shown that Repeater failed to provide service to subscribers for 90 continuous days on either of the frequencies.

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[18] *See* declarations attached to Letters from Audrey Rasmussen to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated January 8 and 22, 2010. PSI subsequently submitted additional information indentifying the location from which Touch Tel conducted the monitoring. *See* Letter from Audrey Rasmussen to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated April 19, 2010.

[19] *See* Attachment A to Letter from Elizabeth R. Sachs to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated May 14, 2010 (Lacalamita Declaration).

[20] *Id.*

[21] *Id.*

[22] *See* Monterey Peninsula College Fire Academy Rental Order No. 4128, dated October 2, 2009 (attached to Lacalamita Declaration).

[23] *See* Auria Pest Control Rental Order No. 4414, dated November 1, 2009 (attached to Lacalamita Declaration).

[24] The letters are attached to the Lacalamita declaration.

[25] Letter from Audrey Rasmussen to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated May 18, 2010.

[26] Declaration attached to Letter from Audrey Rasmussen to Ruth Milkman, Chief, Wireless Telecommunications Bureau, dated May 18, 2010. PSI also claims, without any supporting evidence, that the pest control company and fire academy may not have been at arm's length from Peninsula or Repeater.

10. In sum, based on the totality of the evidence before us,[27] we conclude that PSI has not shown that Repeater failed to serve "subscribers for 90 continuous days" on frequencies 152.060 MHz, 152.150 MHz, and 152.180 MHz.

11. *Waiver Request*. Monterey County seeks waiver of section 20.9(a)(6) of the Commission's rules,[28] which states that mobile services provided on Part 22 Paging and Radiotelephone Service frequencies will be treated as common carriage services and regulated as commercial mobile radio services (CMRS). Monterey County represents that it seeks to use the Part 22 frequencies for internal public safety communications rather than to provide commercial mobile radio service.[29] Specifically, the County intends to use the spectrum as part of an interoperable public safety communications system that serves more than 400,000 residents in an area occupying over 3,000 square miles on California's central coast.[30]

12. We find that the underlying purpose of section 20.9(a)(6)—to regulate mobile services provided on Paging and Radiotelephone Service frequencies as common carriage—would not be served by strict application of the rule here. This regulatory paradigm is not appropriate for frequencies used for internal public safety communications. We also find that that waiver of section 20.9(a)(6) will promote the public interest by ensuring the availability of sufficient spectrum for the County's vital public safety radio communications system.[31] We therefore grant Monterey County's request for waiver of section 20.9(a)(6).

13. 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 sections 1.41, 1.948, and 1.955 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.948, 1.955, the Petition to Dismiss or Deny filed by Paging Systems, Inc. on April 8, 2009, against the assignment of frequencies 152.060 MHz, 152.150 MHz, and 152.180 MHz from Repeater Communications Corporation of California, Inc. to the County of Monterey, Inc. under Station WPOM425, file no. 0003736834, IS DENIED.

14. 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 1.925(b)(3)(i) of the Commission's rules, 47 C.F.R. § 1.925(b)(3)(i), the above-captioned Application for Consent to the Assignment of Authorizations for Stations WPOM425 and WRW245 from Repeater Communications Corporation of California to the County of Monterey, file no. 0003736834, and the related request for waiver of section 20.9(a)(6) of the Commission's rules, 47 C.F.R. § 20.9(a)(6), ARE HEREBY GRANTED.

[27] We note that in reaching our decision today, we did not consider any information filed under a request for confidential treatment by Repeater.

[28] 47 C.F.R. § 20.9(a)(6).

[29] Waiver Request.

[30] *Id*. We note that Section 1 of the Communications Act defines one of the Commission's fundamental purposes as "promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151.

[31] Waiver may be granted, under section 1.925(b)(3)(i) of the Commission's Rules, if a petitioner demonstrates that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest. 47 C.F.R. § 1.925(b)(3)(i).

15. 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

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