

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

In the Matter )
TOUCH TEL CORPORATION ) File Nos. 0004573759 and 0004573760
Applications for Renewal of Licenses for )
Microwave Industrial/Business Pool Stations )
WNTF429 and WCP885 )
TOUCH TEL CORPORATION, Assignor )
PAGING SYSTEMS, INC., Assignee ) File No. 0004726756
Application to Assign Microwave )
Industrial/Business Pool Stations WNTF429 and )
WCP885 )

ORDER ON RECONSIDERATION

Adopted: December 7, 2011

Released: December 8, 2011

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

1. Introduction. In this Order on Reconsideration, we deny petitions for reconsideration of the grants of renewal applications and an assignment application involving microwave stations. We find that most of the arguments raised by petitioners are not appropriately raised with respect to these stations. To the extent petitioners raise arguments specific to those stations, we consider and reject those arguments. Finally, we dismiss without prejudice an improperly filed application for review.

2. Background. On January 14, 2011, Touch Tel Corporation ("Touch Tel") timely filed applications to renew Stations WNTF429 and WCP885 ("Stations").1 On January 26, 2011, the Renewal Applications appeared on Public Notice as accepted for filing and were granted the same day.2 On February 25, 2011, Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC (Petitioners) filed a petition to deny the Renewal Applications.3 Petitioners alleged that Robert Cooper is the real-party-in-interest of both Touch Tel and Paging Systems, Inc. ("PSI"), that PSI lacks the character and fitness to be a Commission licensee, and that Touch Tel, through its association

1 File Nos. 0004573759; 0004573760 (filed Jan. 14, 2011) ("Renewal Applications").

2 Wireless Telecommunications Bureau Site-by-Site Accepted For Filing, Public Notice, Report Number 6562 (WTB rel. Jan. 26, 2011); see also Wireless Telecommunications Bureau Site-by-Site Action, Public Notice, Report No. 6585 (WTB rel. Feb. 2, 2011).

3 Petition to Deny, or in the Alternative Section 1.41 Request (filed Feb. 25, 2011) ("First Petition"). Touch Tel filed an opposition. Opposition to Petition to Deny, or in the Alternative, Section 1.41 Request, Touch Tel Corporation (filed Mar. 10, 2011) ("Opposition to First Petition"). Petitioners filed a reply. Reply to Opposition to Petition to Deny, or in the Alternative Section 1.41 Request, Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC (filed Mar. 18, 2011).

with Robert Cooper, lacks the character and fitness to be a Commission licensee.<sup>4</sup> On March 10, 2011, Touch Tel responded that the First Petition must be dismissed as moot because the applications were granted on January 26, 2011—one month prior to the filing by the Petitioner against the Renewal Applications.<sup>5</sup> In addition, Touch Tel argued that the Petitioners were not a “party in interest” under Section 1.939(a) of the Commission’s Rules<sup>6</sup> because the Petitioners did not operate and provide point-to-point microwave radio services and were not aggrieved by the renewal of the licenses for the Stations.<sup>7</sup> Touch Tel also contended that the First Petition should be dismissed as a strike pleading.<sup>8</sup>

3. On May 5, 2011, the Broadband Division of the Wireless Telecommunications Bureau (“Bureau”) denied the First Petition. The Bureau noted that most of Petitioners’ arguments do not involve the instant Renewal Applications but rather focus on allegations that PSI’s conduct with respect to licenses held by PSI is attributable to Touch Tel and therefore demonstrates that Touch Tel lacks character and fitness to be a Commission licensee.<sup>9</sup> The Bureau explained that the Commission has concluded that “Petitioners’ allegations regarding PSI’s character qualifications, which relate to other PSI licenses and are the subject of other pending proceedings, are more appropriately addressed elsewhere.”<sup>10</sup> The Bureau further found that it will not address arguments against PSI in this proceeding because the instant case involves licenses held by Touch Tel.<sup>11</sup>

4. On May 13, 2011, Touch Tel and PSI filed an application to assign the licenses from Touch Tel to PSI.<sup>12</sup> That application was consented to pursuant to immediate approval procedures<sup>13</sup> on May 17, 2011.<sup>14</sup> The parties consummated the assignment on May 18, 2011.<sup>15</sup>

5. On June 6, 2011, the Petitioners filed a Petition for Reconsideration of the *Order on Reconsideration*.<sup>16</sup> At the same time, Petitioners also filed an Application for Review.<sup>17</sup> Meanwhile, on July 1, 2011, Petitioners filed a petition for reconsideration of the grant of the Assignment Application.<sup>18</sup>

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<sup>4</sup> First Petition at 3.

<sup>5</sup> Opposition to First Petition at 2.

<sup>6</sup> 47 C.F.R. § 1.939(a).

<sup>7</sup> Opposition to First Petition at 2-5.

<sup>8</sup> Opposition to First Petition at at 7-9.

<sup>9</sup> *Order on Reconsideration*, 26 FCC Rcd at 6656 ¶ 3. The Bureau also noted that the Petitioners incorporated, by reference, arguments they raised in other proceedings involving PSI licenses. *Id.*

<sup>10</sup> *Order on Reconsideration*, 26 FCC Rcd at 6656 ¶ 3 (citing Paging Systems, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 450, 454 ¶ 8 (2010), *recon pending*)).

<sup>11</sup> *Order on Reconsideration*, 26 FCC Rcd at 6656 ¶ 3.

<sup>12</sup> File No. 0004726756 (“Assignment Application”).

<sup>13</sup> *See* 47 C.F.R. § 1.948(j)(2).

<sup>14</sup> The Wireless Telecommunications Bureau provided public notice of the consent on June 1, 2011. *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action, Report No. 6894, *Public Notice* (WTB rel. Jun. 1, 2011) at 9.

<sup>15</sup> *See* File No. 0004733677 (filed May 19, 2011).

<sup>16</sup> Petition for Reconsideration Based on New Facts, Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC, (filed June 6, 2011) (“Renewal Petition”).

6. In both the Renewal Petition and the Assignment Petition, Petitioners cite a variety of allegations concerning PSI's character qualifications. In most cases, Petitioners raise allegations that relate to other licenses and that Petitioners have made in the context of those other licenses.<sup>19</sup> However, Petitioners also make two allegations specific to the licenses in question. First, in the Assignment Petition, Petitioners claim that Stations WCP885 is not constructed because the coordinates listed on the licenses are a vacant piece of land.<sup>20</sup> PSI responds that the coordinates on the license are incorrect and that the tower is 83 meters away.<sup>21</sup> Second, in the Renewal Petition, Petitioners allege that the public interest statement provided with the Assignment Application demonstrates that the licenses are being operated as commercial mobile radio service (CMRS) licenses and not as private mobile radio service (PMRS) licenses as authorized.<sup>22</sup> We also note that the Petitioners assert that the Bureau must consider the Petitioners allegations as to whether a "licensee lacks the character and fitness to be a Commission licensee even when said evidence pertains to actions that occurred under a license(s) not subject of the subject petition proceeding."<sup>23</sup>

7. *Discussion.* As a preliminary matter, we note that the Commission's Rules prohibit the filing of a petition for reconsideration and application for review of the same action on delegated authority.<sup>24</sup> In this instance, the Petitioners concurrently filed an Application for Review and a second petition for reconsideration of the same action for which it seeks review with the Bureau claiming to present the Bureau with new facts to support reconsideration. Generally, Section 1.106(k)(3) of the Commission's Rules states that a "petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious."<sup>25</sup> In this case, however, Petitioners also filed a timely petition for reconsideration of the grant of the Assignment Application which raises many of the same issues. We therefore, as matter of administrative convenience, will consider the Renewal

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<sup>17</sup> Application for Review, Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC, (filed June 6, 2011) ("Application for Review").

<sup>18</sup> Petition for Reconsideration, Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC, (filed July 1, 2011) ("Assignment Petition").

<sup>19</sup> Petitioners' allegations include (1) various allegations of misrepresentation or lack of candor by PSI or Touch Tel; (2) allegations that PSI has engaged in fraud and unlawful spectrum warehousing in connection with Automated Maritime Telecommunications System (AMTS) licenses; (3) claims that PSI has failed to file Forms 499-A listing all of its operations around the country; and (4) allegations that PSI and Touch Tel are "sham" entities under common control. *See generally* Assignment Petition at 13-17, 19-26; *see also* Renewal Petition at 2-8.

<sup>20</sup> *See* Assignment Petition at 17-19.

<sup>21</sup> Opposition to Petition for Reconsideration, Paging Systems, Inc. (filed Jul. 14, 2011) at 8.

<sup>22</sup> Renewal Petition at 4-7.

<sup>23</sup> Application for Review at 4; *see also* Renewal Petition at 2-4.

<sup>24</sup> *See* 47 C.F.R. § 1.104(b) ("Any person desiring Commission consideration of a final action taken pursuant to delegated authority shall file either a petition for reconsideration or an application for review (but not both) within 30 days from the date of public notice of such action..."); *see also* Regionet Wireless License, LLC, *Memorandum Opinion and Order*, 17 FCC Rcd 21263, 21265 n.26 (2002); Regionet Wireless License, LLC, *Memorandum Opinion and Order*, 17 FCC Rcd 21269, 21269 n.1 (2002).

<sup>25</sup> 47 C.F.R. § 1.106(k)(3).

Petition together with the Assignment Petition.<sup>26</sup> We will dismiss the Application for Review without prejudice to refiling after this *Order on Reconsideration*.

8. The parties engage in considerable discussion concerning Petitioners' standing.<sup>27</sup> We decline to reach the standing issue. Petitioners had no right to file a formal petition to deny against the Renewal Applications because applications for private microwave licenses are not subject to the public notice requirement or the petition to deny requirement set forth in Sections 309(b) and 309(d)(1), respectively, of the Communications Act of 1934, as amended.<sup>28</sup> Accordingly, any opposition filed against the Renewal Applications would be considered an informal objection filed pursuant to Section 1.41 of the Commission's Rules,<sup>29</sup> which does not require standing.

9. The Commission has discretion whether or not to consider an informal objection.<sup>30</sup> In this case, most of the arguments raised by Petitioners relate to other licenses, and the Petitioners have already raised these arguments in proceedings concerning those licenses. We note that Petitioners' position is that its allegations concerning PSI's character qualifications are relevant to and must be considered in the context of all licenses.<sup>31</sup> The Commission, however, has specifically rejected that argument:

The Commission's policy is that a licensee's misconduct with respect to one station is not necessarily relevant to its qualifications to hold any station license, and "[i]f the Commission has not as an initial matter found that the allegations under consideration involve conduct likely to impact the future operations of other stations, there generally appears to be no reason to condition or defer" processing of applications regarding other stations. We "retain[] the right to impose limitations or take appropriate action against the other stations at a later time if circumstances warrant." Consequently, we agree with [the Bureau's Mobility Division] that Petitioners' allegations regarding PSI's character qualifications, which relate to other PSI licenses and are the subject of other pending proceedings, are more appropriately addressed elsewhere.<sup>32</sup>

The Commission has affirmed that holding on reconsideration, stating: "Under long-standing Commission policy, unless the Commission makes an affirmative decision at that time to impose such restrictions generally on the licensee, the Commission will not encumber proceedings involving the licensee's other licenses with consideration of the pending character allegations made in the principal

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<sup>26</sup> To the extent that the Bureau stated in the *Order on Reconsideration* that it will not address arguments against PSI in this proceeding because the licenses at issue were held by Touch Tel, we note that the licenses were thereafter assigned from Touch Tel to PSI. We therefore will no longer ignore allegations against PSI solely on the basis that the licenses were held by Touch Tel.

<sup>27</sup> See Assignment Petition at 4-10; First Petition at 4-8; Opposition to Petition for Reconsideration, Touch Tel Corporation (filed Jul. 14, 2011) at 2-5.

<sup>28</sup> See 47 C.F.R. § 1.933(d)(9).

<sup>29</sup> See 47 C.F.R. § 1.41.

<sup>30</sup> See, e.g., Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14021 n.335 (2005) ("*Sprint-Nextel*") (citing Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21547 n.196 (2004)).

<sup>31</sup> See Application for Review at 4.

<sup>32</sup> Paging Systems, Inc., *Memorandum Opinion and Order*, 25 FCC Rcd 450, 453-454 ¶ 8 (2010) (internal citations omitted).

proceeding.”<sup>33</sup> “Where the Commission has considered and spoken on an issue, its subordinates may not alter its decision.”<sup>34</sup> Accordingly, we dismiss those portions of both petitions addressing issues that are not directly related to Stations WCP885 and WNTF492.<sup>35</sup> We note that the Commission retains discretion to take any remedial action, including license revocations, that it deems warranted in light of its ultimate resolution of the arguments raised by Petitioners in those proceedings. We emphasize that our determination to grant the instant applications does not prejudice the resolution of the other proceedings.

10. Petitioners do raise two issues specific to the licenses in question. On reconsideration, we agree with Petitioners that those specific issues should be considered in the context of these applications. First, in the Assignment Petition, Petitioners allege that the license for Station WCP885 should be cancelled because it was not constructed at the coordinates listed on its license.<sup>36</sup> Second, in the Renewal Petition, Petitioners allege that the public interest statement provided with the Assignment Application demonstrates that the licenses are being operated as commercial mobile radio service (CMRS) licenses and not as private mobile radio service (PMRS) licenses as authorized.<sup>37</sup> We consider these arguments below.

11. Petitioners provide a declaration and photographs demonstrating that there are no radio facilities constructed at the authorized coordinates of Station WCP885.<sup>38</sup> In response, Touch Tel admits that the coordinates listed on its license are incorrect and that the facilities are constructed on a tower 83 meters away from the coordinates on the license.<sup>39</sup> In that regard, Touch Tel refers to a declaration filed in another proceeding concerning Station WHD866, which shares the same coordinates with Station WCP885.<sup>40</sup> In response, Petitioners call the declaration “bare allegations” that should not be accepted without additional evidence.<sup>41</sup>

12. We find no basis in the record for concluding that the license Station WCP885 should be cancelled. Although Petitioners are correct that Station WCP885 was not built at the authorized coordinates, the Petitioners recognize that Station WCP885 was constructed a short distance away at the same location as the tower for PSI’s Maritime Coastal Station WHD866.<sup>42</sup> Indeed, the Petitioners attach a declaration by Mr. Sournberger that was filed in the proceeding related to Station WHD866 with a notation added to state that Station WCP885 suffers from the same “defects” as it is located at the same

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<sup>33</sup> Paging Systems, Inc., *et al.*, *Order on Reconsideration*, FCC 11-172 (rel. Nov. 29, 2011) at ¶ 7 (*PSI Recon Order*).

<sup>34</sup> George E. Cameron Communications (KROQ), *et al.*, *Memorandum Opinion and Order*, Docket No. 20629, *et al.*, 93 FCC 2d 789, 816 ¶ 29 (1983) (*citing* Atlantic Broadcasting Co., *Memorandum Opinion and Order*, Docket No. 16706, 5 FCC 2d 717, 720 (1966)); *see also* *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C.Cir.1990).

<sup>35</sup> We note that the Commission has “strongly caution[ed] Petitioners and their related companies not to file additional misdirected pleadings of this nature” raising allegations of misconduct not germane to the licenses in question. *See PSI Recon Order* at ¶ 2.

<sup>36</sup> Assignment Petition at 18-19, 26.

<sup>37</sup> Renewal Petition at 4-7.

<sup>38</sup> Assignment Petition, Exhibit C: Part 2, Declaration of Doug Sournberger. Mr. Sournberger provides service to ATLAS Wireless, LLC on behalf of Petitioners and holds a bachelor degree in architecture. *See id.*

<sup>39</sup> Opposition to Petition for Reconsideration, Touch Tel Corporation (filed Jul. 14, 2011) at 8.

<sup>40</sup> *See* File No. 0004697887, Motion to Accept Rebuttal and Rebuttal to Reply to Opposition to Petition to Dismiss or Deny or in the Alternative Section 1.41 Request (filed Jul. 13, 2011), Declaration of David Kling.

<sup>41</sup> Reply to Opposition to Petition for Reconsideration (filed Jul. 26, 2011) at 3.

<sup>42</sup> Assignment Petition, Exhibit C: Part 2, Declaration of Doug Sournberger.

site.<sup>43</sup> Touch Tel agrees that Station WCP885 is at the same site as Station WHD866 and that the coordinates for Station WCP885 are incorrect as the tower is about 83 meters away from the authorized coordinates.<sup>44</sup> Touch Tel references a declaration by David Kling, a systems engineer for Touch Tel, filed in the proceeding related to Station WHD866 stating, under penalty of perjury, that the station was built 83.34 meters away.<sup>45</sup> Under our Part 101 rules, a change of coordinates of less than five seconds in latitude or longitude is considered a minor change.<sup>46</sup> A distance of 83 meters represents fewer than five seconds of latitude or longitude. Because Station WCP885 was constructed within a distance that would be considered a minor change from the authorized coordinates, we reject the contention by the Petitioners that the license should be cancelled for failure to construct or for discontinuance of service.<sup>47</sup>

13. Second, Petitioners have not made a *prima facie* case that Stations WCP885 and WNTF457 are being used to provide a CMRS service. The Communications Act defines CMRS service as “any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public . . .”<sup>48</sup> Nothing in the public interest statement to the Assignment Application indicates that the stations are being used as part of a system to provide interconnected service. Petitioners have therefore failed to plead an essential element of the definition of CMRS, and we decline to find any rule violation.

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.104 and 1.115 of the Commission’s Rules, 47 C.F.R. §§ 1.104, 1.115, the Application for Review filed by Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC on June 6, 2011 IS DISMISSED without prejudice.

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petitions for Reconsideration filed by Warren C. Havens, Environmental, LLC, Skybridge Spectrum Foundation, Intelligent Transportation & Monitoring Wireless, LLC, Verde Systems, LLC, Telesaurus Holdings GB, LLC, and V2G, LLC on June 6, 2011 (with respect to File Nos. 0004573759 and 0004573760) and on July 1, 2011 (with respect to File No. 0004726756) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau

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<sup>43</sup> See *id.*

<sup>44</sup> Reply to Opposition to Petition for Reconsideration (filed Jul. 26, 2011) at 8.

<sup>45</sup> Reply to Opposition to Petition for Reconsideration (filed Jul. 26, 2011) at 8.

<sup>46</sup> See 47 C.F.R. § 1.929(d)(1)(i).

<sup>47</sup> PSI should file a minor change application on Form 601 to correct the coordinates on its license.

<sup>48</sup> See 47 U.S.C. § 332(d)(1).