

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

In the Matter of the Application of)
)
PLAINCOM, INC.) FCC File No. 9507560
)
For Authority to Establish New)
Point-to-Point Microwave Facilities)
In the 38.6-40.0 GHz Frequency Band at)
Knoxville, TN)

ORDER ON RECONSIDERATION

Adopted: December 28, 1999

Released: December 29, 1999

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

1. We have before us a petition for reconsideration (Petition) filed on April 26, 1999, by Plaincom Inc. (Plaincom).¹ Plaincom requests review of a March 25, 1999 Licensing and Technical Analysis Branch (Branch) dismissal of Plaincom's December 31, 1996 and December 4, 1998 amendments to the above-captioned application for authorization in the 38.6-40.0 GHz (39 GHz) band.² For the reasons set forth below, we deny Plaincom's Petition.

2. On July 17, 1995, Plaincom filed a 39 GHz application to provide service in the area of Knoxville, TN.³ On August 25, 1995, WinStar Wireless Fiber Corporation (WinStar) filed a co-channel application for Johnson City, TN that was mutually exclusive with Plaincom's Knoxville application.⁴ On December 15, 1995, the Commission suspended the processing of pending mutually exclusive 39 GHz applications and the filing of amendments thereto, pending the outcome of a rulemaking proceeding affecting this service.⁵ On December 31, 1996, Plaincom filed an amendment,⁶ to which it filed a correction on December 4, 1998,⁷ to cure the mutual exclusivity. In a *Report and Order and Second NPRM*, released on November 3, 1997, the Commission decided that it would dismiss, without prejudice,

¹Plaincom Petition for Reconsideration (filed Apr. 26, 1999) (Petition).

²Letter From Mary Schultz, Chief, Licensing and Technical Analysis Branch, to Ed Clinton, President of Plaincom (Mar. 25, 1999) (Dismissal Letter).

³FCC File No. 9507560. *Public Notice*, Report No. 1146 (rel. Aug. 2, 1995).

⁴FCC File No. 9509449. *Public Notice*, Report No. 1152 (rel. Sept. 13, 1995).

⁵Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988-4989 ¶ 123 (1995).

⁶Letter from Kimberly D. Wheeler, counsel for Plaincom, to Mary Schultz, Acting Chief, Microwave Branch (filed Dec. 31, 1996).

⁷Letter from Ed Clinton, President of Plaincom, to Mary Schultz, Public Safety and Private Wireless Division (filed Dec. 4, 1998).

pending mutually exclusive 39 GHz applications.⁸ On March 25, 1999, the Branch dismissed Plaincom's December 31, 1996 and December 4, 1998 amendments because they were filed after the December 15, 1995 deadline for filing amendments to pending 39 GHz applications.⁹

3. Plaincom first asserts that the two amendments brought its application into compliance with Commission policy and eliminated a frequency conflict with another pending application, and as such should be deemed amendments of right, which are effective when filed – even if filed after December 15, 1995.¹⁰ Plaincom also argues¹¹ that the filing freeze in effect improperly modified or eliminated Sections 101.29¹² and 101.45¹³ of the Commission's Rules without notice and opportunity for comment in violation of Section 553 of the Administrative Procedure Act.¹⁴ Plaincom's third argument¹⁵ is that the dismissal of its amendments violates Section 309(j)(6)(E) of the Communications Act, which requires the FCC to use methods such as negotiation and its own service rules to resolve mutual exclusivity before it holds an auction.¹⁶ Subsequent to the filing of Plaincom's Petition, the Commission rejected these arguments when it denied petitions for reconsideration of its decision to dismiss applications and amendments filed on or after December 15, 1995.¹⁷ Plaincom offers no basis for revisiting these matters here. Thus, consistent with the Commission's decision regarding these and other related issues involving 39 GHz applications,¹⁸ we deny the Petition and affirm the Branch action.

4. Accordingly, IT IS ORDERED that, pursuant to Sections 154(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 Petition for Reconsideration filed April 26, 1999 by Plaincom, Inc. IS DENIED.

⁸See 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*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18641-45 ¶¶ 87-97 (1997).

⁹Dismissal Letter at 1.

¹⁰Petition at 5.

¹¹*Id.* at 8.

¹²47 C.F.R. § 101.29(a).

¹³47 C.F.R. § 101.45(f)(2).

¹⁴See 5 U.S.C. § 553.

¹⁵Petition at 11.

¹⁶See 47 U.S.C. § 309(j)(6)(E).

¹⁷See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12441-48 ¶¶ 22-38 (1999).

¹⁸*Id.*

5. 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