

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
LARRY D. HENDERSON AND)
ROBERT S. BENZ d/b/a QUAD) FOIA Control No. 99-214
COMMUNICATIONS)
)
on Request for Inspection)
of Records)
)
In the Matter of)
)
GELICO, INC., DEBTOR IN)
POSSESSION)
)
on Request for Confidential Treatment)
of Documents)

MEMORANDUM OPINION AND ORDER

Adopted: August 16, 2000; Released: August 18, 2000

By the Commission:

1. The Commission has before it applications for review filed by Gelico, Inc., Debtor in Possession (Gelico) of the decisions of the Wireless Telecommunications Bureau (WTB or Bureau) granting in part and denying in part the Freedom of Information Act (FOIA) request by Larry D. Henderson and Robert A. Benz d/b/a Quad Communications (Quad) for inspection of records submitted by Gelico with a request for confidential treatment. For the reasons stated below, we deny the applications for review.

2. The genesis of the matter may be traced to Quad's "Petition to Purge Authorization" of a 900 MHz Specialized Mobile Radio service license held by Gelico. In response to that petition, Gelico submitted certain documents for in camera inspection by the Commission, and sought confidential treatment pursuant to section 0.459 of the Commission's rules, 47 C.F.R. § 0.459. Quad's petition was denied, and Quad sought reconsideration of the

1 Gelico is a wholly owned subsidiary of Geotek Communications, Inc., Debtor in Possession (Geotek).

denial of its petition. It also filed a FOIA request “to inspect all documents provided to the Commission by Gelico . . . and all documents on which the Commission relied” in rendering its decision denying Quad’s petition.²

3. In ruling on the FOIA request and Gelico’s request for confidential treatment,³ the Bureau identified three sets of documents that Gelico claimed were confidential and that were the subject of Quad’s FOIA request: an engineering study with attachments; a site lease agreement with an attachment; and a listing of lease payments with copies of checks.⁴ It determined that even if these documents were entitled to confidential treatment pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), as Gelico claimed, public interest considerations favoring openness in Commission licensing proceedings compelled disclosure of at least portions of the documents.⁵ The Bureau explained that Quad would be “at a disadvantage if it does not have access to the same materials the Commission staff had and will have in deciding” Quad’s petition.⁶ In light of Quad’s representation that for its participation in the underlying proceeding it did not require access to all of the three sets of documents listed above, the Bureau only permitted “release of information that pertains to the locations of Gelico’s sites, how long the leases have been operative, and the parameters of the stations’ operation.”⁷

² Letter from George L. Lyon, Jr., Esq., to Andrew S. Fishel, Managing Director (Sept. 8, 1999). In response to a request from the Bureau, Quad and Gelico filed comments concerning the request for confidentiality in light of the FOIA request. See letter from Russell H. Fox, Esq. To William Kunze, Deputy Chief, Commercial Wireless Division, WTB (Oct. 13, 1999); letter from George L. Lyon, Jr., Esq. and Pamela G. Holran, Esq., to William Kunze, Deputy Chief, Commercial Wireless Division, WTB (Oct. 25, 1999).

³ See 47 C.F.R. § 0.459(d)(1) (the Commission will not normally act on a request for confidential treatment until a request for inspection of records has been filed).

⁴ Gelico did not seek confidential treatment of a declaration from an attorney employed by Geotek certifying to the accuracy of the records. This document was released pursuant to the FOIA request.

⁵ Letter from William W. Kunze, Deputy Chief, Commercial Wireless Division, WTB, to George L. Lyon, Jr., Esq., Pamela G. Holran, Esq., Russell H. Fox, Esq., and Russ Taylor, Esq. (Nov. 8, 1999) (Bureau Decision) at 3, citing Liberty Cable Company, Inc., 11 FCC Rcd 2475, 2476-77 (1996), aff’d sub nom. Bartholdi Cable Co. v. FCC, 114 F.2d 274 (D.C. Cir. 1997).

⁶ Id.

⁷ Id. Specifically, the Bureau authorized release of parts of the engineering statement pertaining to the sites at issue in Quad’s petition; the site lease agreement; and a redacted chart showing the dates checks were written to pay for the lease. Id. at 3-4.

4. Gelico sought Commission review of the Bureau decision, but in the same pleading it also sought Bureau reconsideration of its decision.⁸ Quad replied.⁹ The Bureau denied reconsideration.¹⁰ Gelico then filed a second application for review of the Bureau's Reconsideration Decision,¹¹ and Quad replied.¹² We have reviewed the record and documents in this proceeding and deny Gelico's applications for review.

5. A two-part analysis is required by this proceeding: whether Gelico has met its burden of proving that the documents are confidential within the meaning of FOIA Exemption 4, and, if so, whether Quad has made a persuasive showing that the public interest nevertheless supports disclosure of the materials.¹³ See Bureau Decision at 3; 47 C.F.R. § 0.457(d)(2). Gelico complains that the Bureau did not adequately analyze whether its materials are within FOIA Exemption 4.¹⁴ However, the Bureau necessarily assumed that Gelico met its burden under the first part of the analysis. See Bureau Decision at 3. Otherwise, the Bureau would not have proceeded to determine whether the public interest required disclosure. We agree with the Bureau's determination, and Quad's replies, which focus on the second step of our analysis. Consequently, we need not address Gelico's arguments that the Bureau inadequately assessed the confidentiality of its materials.

6. Gelico next maintains that there is no basis for disclosing materials entitled to confidential treatment. It is well established under our rules and precedent that we may disclose such materials when policy considerations in favor of disclosure outweigh those favoring non-

⁸ Letter from Russell H. Fox, Esq., and Russ Taylor, Esq., to Christopher J. Wright, General Counsel (Nov. 22, 1999) (First App. for Rev.).

⁹ Letter from George L. Lyon, Jr., Esq., and Pamela Gaary, Esq., to Christopher J. Wright, General Counsel (Dec. 3, 1999) (Quad's First Reply).

¹⁰ Letter from William W. Kunze, Deputy Chief, Commercial Wireless Division, WTB, to George L. Lyon, Jr., Esq., Pamela G. Holran, Esq., Russell H. Fox, Esq., and Russ Taylor, Esq. (Dec. 15, 1999) (Reconsideration Decision). On the same day the Bureau denied reconsideration, Gelico filed a reply to Quad's First Reply. Letter from Russell H. Fox, Esq. and Russ Taylor, Esq., to Christopher J. Wright, General Counsel (Dec. 15, 1999) (Reply to Quad's First Reply).

¹¹ Letter from Russell H. Fox, Esq., and Russ Taylor, Esq., to Christopher J. Wright, General Counsel (Dec. 29, 1999) (Second App. for Rev.).

¹² Letter from George L. Lyon, Jr., Esq., and Pamela Gaary, Esq., to Christopher J. Wright, General Counsel (Jan. 11, 2000) (Quad's Second Reply).

¹³ First App. for Rev. at 2; Quad's First Reply at 2.

¹⁴ First App. for Rev. at 2.

disclosure.¹⁵ In the circumstances of this proceeding, as we now discuss, we agree with the Bureau that the public interest in disclosure outweighs Gelico's interest in non-disclosure of the materials.

7. Quad is the geographic area licensee in a area where Gelico is an incumbent site-based licensee. Quad's FOIA request arises in the context of Quad's "Petition to Purge Authorization" of Gelico's station WNMO982, asserting that Gelico did not construct or operate the station as required by Commission rules. In the event that Gelico did not comply with those rules, its license would be cancelled and Quad would be able to construct and operate base stations using the frequency. 47 C.F.R. § 90.663(b).

8. Gelico filed a response to Quad's petition, including the materials at issue here, and based on that reply, the Bureau denied Quad's petition.¹⁶ Quad has sought reconsideration of the Bureau's decision. As noted above, it also filed the FOIA request to enable it to review the materials that formed the basis for the Bureau's decision. Gelico, however, seeks to deny Quad the right to see the evidence that it did construct and operate the station.

9. Gelico argues that Quad should not be allowed to see these materials because the matter in issue is an enforcement matter and is thus unlike the licensing proceeding in Liberty Cable, which the Bureau cited in support of its decision to afford Quad access to the materials. We agree with Gelico that there are distinctions between this proceeding and Liberty Cable in that this proceeding does not implicate the statutory procedural rights of a petitioner to deny that were at issue in Liberty Cable. We also agree that, depending on the circumstances, commenting parties in enforcement proceedings may not necessarily have the same entitlement to underlying procedural protections that are accorded petitioners to deny.

10. Nevertheless, we conclude that the Bureau properly exercised its discretion in determining that there were persuasive reasons in this case to allow Quad access to these records. The information at issue was used by the Bureau to determine the disposition of Quad's complaint against Gelico, and this is central to determining whether Quad or Gelico may be entitled to use these frequencies. We conclude, therefore, that the principles articulated in Liberty Cable concerning procedural fairness to parties in our licensing proceedings should be equally applicable here. Because issues here implicate important rights of both affected parties

¹⁵ See Examination of Current Policy Concerning Treatment of Confidential Information Submitted to the Commission, 13 FCC Rcd 24816, 24818, 24822-24 (1998); see also Bartholdi, 114 F.3d at 281, citing Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); 47 C.F.R. § 0.457(d)(2).

¹⁶ Letter from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, WTB, to Elizabeth R. Sachs, Esq., and Russell H. Fox, Esq. (Aug. 9, 1999).

concerning use of this spectrum, the Bureau correctly concluded that Quad is entitled to access to the materials submitted by Gelico.

11. Contrary to Gelico's contentions, the Bureau weighed the possibility of harm to Gelico against the public interest considerations favoring openness and fairness in our licensing proceedings. The Bureau did not make all of Gelico's materials available to Quad. Rather, because Quad indicated that it required only some of the materials submitted by Gelico, the Bureau granted Quad access only to "information that pertains to the locations of Gelico's sites, how long the leases have been operative, and the parameters of the stations' operations." Bureau Decision at 3-4.¹⁷ Gelico claims that Quad would act improperly if Quad were granted access to this information,¹⁸ but Quad maintains that it has never attempted to disrupt Gelico's relationship with any entity.¹⁹ Gelico fears that Quad would improperly use information concerning transmitter sites, but those fears are not supported by the record.²⁰

12. Finally, we agree with the Bureau that Southern Company Request for Waiver of Section 90.629 of the Commission's Rules, 14 FCC Rcd 1851, 1860 (1998), cited by Gelico,²¹ is inapposite. See Reconsideration Decision at 1. In that proceeding, Southern Company sought a waiver to extend the implementation period for a wide-area Specialized Mobile Radio network. Southern provided construction status information, which it supplied with a request for confidentiality. The Bureau concluded that other businesses could use "this comprehensive data to Southern's competitive disadvantage," and because the data would not customarily be released to the public, it granted Southern's request for confidentiality. Id. As the Southern Company proceeding did not arise in the FOIA context, and apparently none of the parties commenting on Southern's waiver request sought access to the materials, there was no need to determine if a public interest existed that outweighed Southern's interest in the non-disclosure of the materials. In contrast, a strong public interest exists in this proceeding for Quad to have access to some of the materials submitted with a request for confidentiality by Gelico.

¹⁷ Quad does not seek the entire portion of the site lease. See letter from George L. Lyon, Jr., and Pamela G. Holran to William Kunze (Oct. 25, 1999) at 7. We clarify here that under the Bureau Decision at 3-4 only those parts of the site lease revealing the location of Gelico's site and how long it has been operating will be released.

¹⁸ First App. for Rev. at 4.

¹⁹ Quad's First Reply at 5.

²⁰ Gelico fears that if Quad learns the actual transmitter site, Quad will attempt to disrupt its operations there. Quad denies that it would do so. There is no evidence that Quad's investigation of whether Gelico was operating at various sites was done improperly. See Petition to Purge at Exhs. 9 and 10 (affidavit and letters submitted in support of petition indicating results of frequency monitoring, and mere informational inquiries).

²¹ First App. for Rev. at 3; Second App. for Rev. at 3 n.3

13. Accordingly, IT IS ORDERED that the applications for review by Gelico, Inc., Debtor in Possession, ARE DENIED. Gelico may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B) within 10 working days, see 47 C.F.R. § 0.461(i)(4). If Gelico does not seek a stay of this decision within 10 working days, the Bureau may disclose the portions of the documents sought by Quad.

14. The Officials responsible for this action are the following Commissioners: Chairman Kennard, Commissioners Ness, Furchtgott-Roth, Powell and Tristani.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary