

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

In the Matter of Applications of)
)
COMMCO, L.L.C.) FCC File Nos. 9600712, 9600713,)
) 9600719, 9600720
For Licenses for 39 GHz Point-to-Point)
Throughout the United States)

Microwave Station

ORDER

Adopted: October 18, 1999

Released: October 20, 1999

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

1. This Order consolidates four petitions to deny (Petitions) filed on December 1, 1995 by WinStar Wireless Fiber Corp. (WinStar), a subsidiary of WinStar Communications, Inc. (WSC), against the above-captioned applications filed by Commco L.L.C. (Commco) for 38.6 to 40.0 GHz (39 GHz) Point-to-Point Microwave Radio Station licenses in Baltimore, Maryland; New York (West), New York; New York, New York; and New York (Long Island), New York. As discussed in further detail below, we find that the Commco applications are defective because they were untimely filed. Consequently, the Petitions are hereby granted, and the Commco applications are dismissed.

2. On March 4, 1994, WinStar's predecessor in interest, Avant-Garde Telecommunications, Inc. (Avant-Garde),¹ filed applications to modify certain existing licenses in the 39 GHz band in Baltimore, Maryland; New York (West), New York; New York, New York; and New York (Long Island), New York.² The Avant-Garde applications were placed on public notice on July 6, 1994.³

3. On April 11, 1995, Avant-Garde filed an application for transfer of control of Avant-Garde to WinCom Corp., a subsidiary of WSC (Transfer Application).⁴ In the Transfer Application, WSC asserted that the transfer of control was for legitimate business purposes and would benefit the public. Specifically, WSC noted that the transfer would enable WSC to acquire financial strength and technical expertise and would ultimately (a) allow the "expansion of [WSC]'s telecommunications operations throughout the United States," (b) ensure that "advanced technologies are made available to Avant-Garde's current customers" via WSC's "greater access to capital," and (c) enhance "[WSC]'s offerings and

¹Avant-Garde was merged into WinCom Corp., a subsidiary of WSC. WinCom Corp. was the surviving corporation. On July 18, 1995, WinCom Corp. changed its name to WinStar Wireless Fiber Corp. (WinStar).

²The Wireless Telecommunications Bureau granted FCC File No. 9404183. See *Public Notice*, Wireless Telecommunications Bureau Weekly Receipts and Disposals, Report No. 1975 (February 10, 1998).

³*Public Notice*, Private Radio Bureau Part 21 Receipts and Disposals, Report No. 1090 (July 6, 1994).

⁴FCC Application for Consent to Transfer Control of Avant-Garde Telecommunications, Inc. to WinCom Corp. FCC File No. 9513155 (Transfer Application).

the competitiveness of 39 GHz operations."⁵ On May 1, 1995, the Transfer Application appeared on public notice as accepted for filing.⁶

4. On June 26, 1995, the former Microwave Branch (Branch), Licensing Division,⁷ granted the Transfer Application.⁸ WinCom filed a letter on July 18, 1995, notifying the Commission that the subject merger had been consummated and that WinStar was the surviving corporation.⁹ On August 4, 1995, WinStar filed letters (Notification Letters) informing the Commission that pursuant to the Avant-Garde/WinStar merger, the subject applications should be amended to specify WinStar as the applicant.¹⁰ WinStar also requested that the Commission either categorize the Notification Letters as minor amendments or exempt them from the "cut-off" provisions of Section 21.31¹¹ of the Commission Rules.¹² The pending Avant-Garde applications appeared on public notice on August 16, 1995, under WinStar's name.

5. On October 16, 1995, Commco submitted the above-captioned competing applications against the Avant-Garde/WinStar applications. On December 1, 1995, WinStar filed the subject Petitions against the Commco applications.¹³

6. WinStar alleges that Commco's applications were filed after the sixty-day cut-off date for filing competing applications.¹⁴ Commco replies that WinStar's August 4, 1995 Notification Letters

⁵Transfer Application at Exhibit L.

⁶*Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1132 (May 1, 1995)

⁷Pursuant to an internal reorganization at the Wireless Telecommunications Bureau in 1997, the Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division assumed the functions of the former Microwave Branch.

⁸*Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1142 (July 5, 1995).

⁹Letter from Stephen L. Goodman, Esq. to William F. Caton, Acting Secretary, FCC (July 18, 1995). The July 18, 1995 letter also informed the Commission that WinCom Corp. had changed its name to WinStar Wireless Fiber Corp.

¹⁰Amendment to Pending Applications to Specify the Transfer of Control to WinStar Wireless Fiber Corp. (dated August 4, 1995). *Public Notice*, Wireless Telecommunications Bureau Part 21 Receipts and Disposals, Report No. 1148 (August 16, 1995).

¹¹Former 47 C.F.R. § 21.31, now 47 C.F.R. § 101.45.

¹²Although 39 GHz applications are now subject to Section 101 of the Commission's Rules, Section 21 applies to the underlying applications because they were filed prior to July 31, 1996. *See* 47 C.F.R. § 101.4(a).

¹³Commco filed a Consolidated Opposition to Petitions to Deny on December 14, 1995 (Commco Opposition). On January 11, 1996, WinStar filed a Consolidated Reply to Consolidated Opposition (WinStar Reply).

¹⁴On December 1, 1995, WinStar filed four Petitions to Deny against the above-captioned Commco applications. (Petitions).

constituted major amendments to its original applications, thus opening a new filing window within which Commco timely filed competing applications.¹⁵ As we have previously found, however, the amended applications did not open a new filing window.¹⁶ In this connection, we note that former Section 21.23(c)(5) of the Commission's Rules, as then in effect, provided that an amendment done to reflect a change in ownership is not a major amendment when the assignment "is for legitimate business purposes other than the acquisition of applications."¹⁷ In *Airsignal International*, the Commission held that amendments to pending applications to reflect a change in ownership caused by a merger that was previously approved by the Commission meets this standard.¹⁸ We find that the subject amendments reflect a change in ownership or control found by the Commission to be in the public interest when Avant-Garde's application for transfer of control was granted. Consequently, we conclude that a new filing window was not opened by the August 16, 1995 Public Notice announcing the WinStar amended applications. As a result, the Commco applications were not timely filed because they were received after the applicable cut-off date of September 5, 1994. We therefore dismiss the Commco applications as untimely filed against WinStar's first-filed applications requesting substantially identical frequencies in the same geographical areas.

7. IT IS ORDERED that, pursuant to Sections 4(i) and 309(d) of the Communications Act of 1934 as amended, 47 C.F.R. §§ 154(i) and 309(d) and Section 21.20(a)(2) of the Commission's Rules, 47 C.F.R. § 21.20(a)(2), the WinStar Petitions to Deny filed on December 1, 1995, ARE GRANTED, and the Commco applications, FCC File Nos. 9600712, 9600713, 9600719, 9600720, filed on October 16, 1995, ARE DISMISSED.

8. This action is taken pursuant to delegated authority granted under provisions under Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

¹⁵Commco filed the subject competing applications on October 16, 1995, within 60 days of the release of the August 16, 1995 Public Notice.

¹⁶See Applications of James W. O'Keefe for Licenses for 39 GHz Point-to-Point Stations in Various Locations Throughout the United States, *Order*, DA 99-1210, ¶¶ 8-9 (WTB PSPWD rel. June 22, 1999) (*O'Keefe Order*).

¹⁷Former 47 C.F.R. § 21.23(c)(5), now 47 C.F.R. § 1.927(h); see also former 47 C.F.R. § 21.31(e)(3), now 47 C.F.R. § 1.927(h).

¹⁸ *Airsignal International, Inc.*, 81 FCC 2d 472 (1980); see also *O'Keefe Order* at ¶ 12.