

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

In the Matter of Applications of)	
)	
JAMES W. O'KEEFE)	
)	FCC File Nos. 9600639 - 9600662
For Licenses to Operate Point-to-Point)	9600665 - 9600668
Microwave Facilities in the 39 GHz)	
Frequency Band at Various Locations)	
Throughout the United States)	

ORDER ON RECONSIDERATION

Adopted: December 13, 1999

Released: December 14, 1999

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

I. INTRODUCTION

1. In this *Order on Reconsideration*, we address the petition for reconsideration (Petition)¹ filed by James W. O'Keefe (O'Keefe) regarding an *Order*² that granted WinStar Wireless Fiber Corp.'s (WinStar) petitions to deny the above-captioned applications, and dismissed the applications as untimely filed. For the reasons stated below, we deny the Petition.

II. BACKGROUND

2. On March 4, 1994, WinStar's predecessor in interest, Avant-Garde Telecommunications, Inc. (Avant-Garde) filed applications for grant of three 38.6 - 40.0 GHz frequency band (39 GHz band) channel pairs in thirty markets.³ On April 11, 1995, Avant-Garde filed an application for transfer of control (Transfer Application) of Avant-Garde to WinCom Corp., a wholly-owned subsidiary of WinStar Communications, Inc.⁴ The Transfer Application referred to the pending March 4, 1994 Avant-Garde

¹James W. O'Keefe (O'Keefe) Petition for Reconsideration (filed July 22, 1999) ("*Petition*").

²Applications of James W. O'Keefe for Licenses for 39 GHz Point-to-Point Microwave Stations in Various Locations Throughout the United States, *Order*, DA 99-1210 (WTB PSPWD rel. June 22, 1999) ("*Order*").

³*Id.* at ¶ 2.

⁴*Id.* at ¶ 3.

applications.⁵ On July 5, 1995, a public notice announcing the grant of the transfer application was released.⁶ WinStar notified the Commission on July 18, 1995 that the subject merger had been consummated and that the name of the surviving corporation was WinStar Wireless Fiber Corp.⁷ On August 4, 1995, WinStar filed letters (Notification Letters) informing the Commission that the pending Avant-Garde applications should be amended to specify WinStar as the applicant.⁸ WinStar also requested that the Commission either categorize the letters as minor amendments or exempt them from the “cut-off” provisions of Section 21.31 of the Commission's Rules.⁹ The amended applications appeared on public notice on August 16, 1995, under WinStar's name.¹⁰

3. On October 16, 1995, O'Keefe filed applications for new 39 GHz licenses.¹¹ The pending applications of WinStar and O'Keefe requested the same or substantially identical frequencies in the same geographical areas. On December 1, 1995, WinStar filed petitions to deny O'Keefe's applications, asserting that the transfer of Avant-Garde to WinStar did not open a new filing window,¹² and that even if it did, O'Keefe filed competing applications long after such a window would have closed.¹³ WinStar also asserted that the Notification Letters did not open a new filing window, because they were minor amendments exempt from the Commission's “cut-off” requirements.¹⁴

4. On June 22, 1999, we granted WinStar's petitions, and dismissed O'Keefe's applications.¹⁵ We determined that WinStar's amendments did not open a new filing window, because they were minor according to former Section 21.23(c)(6) of the Commission's Rules,¹⁶ which exempts amendments from classification as major when they merely reflect a transfer of ownership or control that is not primarily to acquire pending applications.¹⁷ Following the precedent of *Airsignal International, Inc.*,¹⁸ we concluded

⁵*Id.*; see also WinStar Wireless Fiber Corp. (Winstar) Transfer of Control Application, Exhibits C (“Avant-Garde's pending applications to expand the number of authorized channel pairs in the cities in which it is licensed will also be transferred”) and L (“given these public interest benefits from the transfer of both licenses and applications...”).

⁶*Order* at ¶ 3.

⁷*Id.* The July 18, 1995 letter also informed the Commission that WinCom Corp. had changed its name to WinStar Wireless Fiber Corp. *Id.* at n.7.

⁸*Id.* at ¶ 4.

⁹*Id.* Although 39 GHz applications are now subject to Section 101 of the Commission's Rules, Part 21 applies here, since these applications were filed prior to July 31, 1996. See 47 C.F.R. § 101.4(a).

¹⁰*Order* at ¶ 4.

¹¹*Id.* at ¶ 5.

¹²*Id.* at ¶ 6.

¹³*Id.*

¹⁴WinStar Petition to Deny at 2, 3 (filed Dec. 1, 1995).

¹⁵*Order* at ¶¶ 14, 15.

¹⁶47 C.F.R. § 21.23(c)(6) (1995).

¹⁷*Order* at ¶ 12.

that the WinStar/Avant-Garde merger, previously approved by the Commission and found to be in the public interest, satisfied the Section 21.23(c)(6) exemption.¹⁹ We therefore found that O’Keefe’s applications were untimely because they were filed more than thirty days after the applicable cut-off date of July 6, 1994.²⁰ O’Keefe filed the Petition on July 22, 1999.

III. DISCUSSION

5. O’Keefe argues that the Division’s reliance on *Airsignal* is misguided because the facts at issue in this matter are different from those therein. Specifically, O’Keefe infers that the Commission was not fully aware of the pending applications that would transfer to WinStar when it approved the Winstar/Avant-Garde merger. O’Keefe contends that WinStar should have submitted the details of its later Notification Letters at the same time as its Transfer Applications, including “the number of licenses (constructed and unconstructed) and pending applications that are to be acquired, and the amount and allocation of the total consideration paid.”²¹ WinStar responds that *Airsignal* followed a substantially identical course of events, including a similar timeline.²² WinStar notes that its Notification Letters, like those of *Airsignal*, necessarily came after approval of its Transfer Application,²³ in accordance with the Commission’s Rules.²⁴

6. As noted above, the Transfer Application notified the Commission of the pending Avant-Garde applications.²⁵ In determining that the application amendments were minor, we relied upon provisions of former Section 21.23(c)(5) of the Commission’s Rules,²⁶ together with our judgment that the amendments constituted “an independent legitimate business purpose...not primarily for acquiring pending applications,” reflecting a change in ownership that it found to be in the public interest.²⁷ We agree that *Airsignal* governs the present case, despite O’Keefe’s arguments that we should retroactively impose new requirements regarding the specificity with which pending applications must be discussed,²⁸ and that by granting WinStar’s petition to deny, the Division “created a *per se* approach to ownership amendments.”²⁹ Consequently, we reaffirm our conclusion that a new filing window was not

¹⁸ *Airsignal International, Inc., Memorandum Opinion and Order*, 81 FCC 2d 472 (1980) (“*Airsignal*”).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Petition* at 8. O’Keefe also compares three further Commission cases that fell under the § 21.23 exemption, but he cites findings rather than their specific factual distinctions, failing to distinguish the instant case. *Id.* at 9.

²² *See* Opposition of WinStar, Exhibit A (filed Aug. 4, 1999).

²³ *Id.* at 6 n.25.

²⁴ *See* 47 C.F.R. § 21.38 (1995).

²⁵ *See supra* note 3.

²⁶ 47 C.F.R. § 21.23(c)(5) (1995).

²⁷ *Order* at ¶¶ 11, 12 (citing *Airsignal*).

²⁸ O’Keefe Reply to Opposition to Petition for Reconsideration at 4, 5 (filed Aug. 10, 1999).

opened by the August 16, 1995 *Public Notice* announcing the WinStar amended applications. Therefore, O'Keefe's applications were not timely filed because they were received after the cut-off date created by the July 6, 1994 *Public Notice*.

7. O'Keefe further argues that the Division, by exempting WinStar from its cut-off rules, violated *Ashbacker Radio Corp. v. FCC*, which requires that all applications accepted for filing be treated equally.³⁰ We believe that O'Keefe's argument is misguided, however, because we did not grant any waiver, but instead held that, under the applicable rules, the amendments were minor and did not trigger a new filing window.³¹ Thus, we believe that our decision is consistent with *Ashbacker*.

IV. CONCLUSION

8. For the reasons set forth above, we deny the O'Keefe petition for reconsideration. Because the WinStar amendments did not trigger a new filing window, O'Keefe's applications were untimely filed and thus dismissed.

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 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 on July 22, 1999 by James W. O'Keefe IS DENIED.

10. This action is taken pursuant to delegated authority granted under the provisions of 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

²⁹*Petition* at 12.

³⁰*Id.* at 12, 13 (citing *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945)).

³¹*Order* at ¶ 9.