

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

In the Matter of)	
)	
MIDWEST BELL COMMUNICATIONS)	FCC File No. D119887
)	
Petition for Reconsideration of Grant of License for)	
Station WPPU614, Parma, Ohio)	

ORDER ON RECONSIDERATION

Adopted: June 19, 2000

Released: June 21, 2000

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

1. *Introduction.* On February 18, 2000, WJG MariTEL Corporation (MariTEL) filed a petition requesting reconsideration of the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch's grant to Midwest Bell Communications (Midwest Bell) of a license for private land mobile radio (PLMR) Station WPPU614 at Parma, Ohio.¹ For the reasons set forth below, the petition for reconsideration is granted and Midwest Bell's authorization to operate Station WPPU614 is partially set aside.

2. *Background.* Formerly, maritime very high frequency (VHF) public correspondence channels were licensed on a site-by-site basis.² In addition, PLMR operations could be authorized to use unassigned maritime VHF public coast (VPC) station channels under certain conditions, pursuant to Section 90.283 of the Commission's Rules.³ In 1998, however, the Commission modified the rules to adopt a geographic area licensing approach for VPC spectrum.⁴ As a result, the Commission announced that it would authorize a single licensee for all VHF public correspondence channels that were, at that time, unassigned in each licensing region in lieu of the site-based approach that had been used.⁵ The Commission also deleted Section 90.283.⁶ The Commission completed the auction for the forty-two unassigned VPC geographic area licenses on December 14, 1998.⁷ MariTEL participated in the auction of the VPC station licenses, and was the winning bidder for nine exclusive VPC geographic area licenses,

¹ WJG MariTEL Corporation Petition for Reconsideration (Petition) (filed Feb. 18, 2000).

² Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, PR Docket No. 92-257, 13 FCC Rcd 19853, 19859, ¶¶ 9(1998) (*Third R&O*).

³ See 47 C.F.R. § 90.283 (1997).

⁴ *Third R&O*, 13 FCC Rcd at 19859-60 ¶¶ 10-11.

⁵ *Id.* at 19856 ¶ 1.

⁶ *Id.* at 199912.

⁷ VHF Public Coast Service Auction Closes, *Public Notice*, 14 FCC Rcd 480, 480 (1998).

including the VPC-005 region, which encompasses the Great Lakes area.⁸ MariTEL's VPC geographic area licenses were granted on May 19, 1999.

3. On May 11, 1999, Midwest Bell's application for a trunked PLMR station in the area of Parma, Ohio, which is located in the VPC-005 region, appeared on public notice as accepted for filing.⁹ Midwest Bell's application requested a number of frequencies, including several VHF public correspondence frequencies.¹⁰ On January 19, 2000, Midwest Bell's application was granted under Call Sign WPPU614.¹¹

4. On February 18, 2000, MariTEL timely filed a petition requesting that Midwest Bell's authorization be partially set aside. On March 6, 2000, Midwest Bell filed an opposition.¹² MariTEL filed a reply on March 15, 2000.¹³

5. *Discussion.* We agree with MariTEL that Station WPPU614 was improperly authorized to operate on VPC spectrum to the extent that Midwest Bell's license conflicts with MariTEL's VPC license covering Cuyahoga County and the rest of the VPC-005 region.¹⁴ All previously unassigned Maritime VHF public correspondence frequencies in that frequency were assigned to MariTEL on May 19, 1999, so they were not available for assignment to Midwest Bell. Therefore, Midwest Bell's application should have been dismissed to the extent it was at odds with MariTEL's VPC-005 license.¹⁵ We concur with MariTEL that failure to modify Midwest Bell's subject license would adversely affect MariTEL's VPC license.¹⁶

⁸ *Id.* at 488.

⁹ FCC File No. D119887. *See Public Notice*, Report No. 2040 (rel. May 11, 1999).

¹⁰ FCC File No. D119887. The frequencies in dispute are 157.2250 MHz, 157.250 MHz, 157.3250 MHz, 157.3750 MHz, 157.400 MHz, 161.8500 MHz, 161.9250 MHz, 161.9750 MHz and 162.000 MHz. Each of these is the coast or ship transmit frequency of a VHF public correspondence channel. *See* 47 C.F.R. 80.371(a)(1)(i).

¹¹ *See Public Notice* Report No. 2077 (rel. Jan. 25, 2000).

¹² Midwest Bell Communications Motion for Dismissal of Petition for Reconsideration (filed Mar. 6, 2000) (Opposition). Section 1.106(g) of the Commission's Rules requires that oppositions be filed within ten days after the petition for reconsideration. 47 C.F.R. § 1.106(g). However, where the time limit for a pleading is set by the Commission and not by statute, as it is here, the Commission has the discretion to accept late-filed materials. *See* Clifford Stanton Heinz Trust, *Memorandum Opinion and Order*, 11 FCC Rcd 5354, 5357 ¶ 20 (WTB 1996). Because consideration of the late filing would not prejudice MariTEL or impede our resolution of the matter, we shall consider the Midwest Bell's Opposition, in the interest of having a complete a record as possible. *See* California Industrial Service, Inc., *Order on Reconsideration*, 14 FCC Rcd 19377, n.1 (PSPWD WTB 1999). We also note that the Office of the General Counsel (OGC) has found that Midwest Bell submitted a letter to the Commission without serving it on MariTEL in violation of the Commission's ex parte rules. This matter is being addressed separately by OGC.

¹³ WJG MariTEL Corporation Reply to Opposition (filed Mar. 15, 2000).

¹⁴ *Id.*

¹⁵ *See* 47 C.F.R. § 1.934(e)(2).

¹⁶ *Id.* at 3-4.

6. We find Midwest Bell's arguments to the contrary unpersuasive. Midwest Bell argues that that it had obtained its license in good faith reliance on its frequency coordinator and in accordance with the applicable rules.¹⁷ We note, as an initial matter, that any recommendation submitted by the frequency coordinator is only advisory in nature and is not an assurance that the Commission will grant a license for the operation on that frequency.¹⁸ Here, the frequency coordinator used by Midwest Bell incorrectly recommended frequencies that had already been authorized to MariTEL as a result of the VPC auction. Moreover Midwest Bell's argument that our Part 90 rules authorize the assignment of the subject frequencies to Midwest Bell¹⁹ is incorrect. Section 90.173(j) of the Commission's Rules provides, in relevant part, that frequencies in the 150-174 MHz band may be assigned for PLMR use provided that (1) the applications are accompanied by a showing of frequency coordination, (2) the frequencies are not available in any other rule part, and (3) the authorized bandwidth does not overlap spectrum available in other rule parts unless that spectrum is also allocated in Part 90.²⁰ Although Midwest Bell satisfied the first condition, it cannot satisfy the second condition because the frequencies are available under Part 80 of the Commission's Rules. Therefore, Midwest Bell was not licensed in accordance with our Rules.

7. Midwest Bell also argues that it will not cause harmful interference to MariTEL because MariTEL has not constructed near Parma, Ohio.²¹ In addition, Midwest Bell asserts that while MariTEL's license grants it exclusive authority to use these frequencies for maritime public correspondence, this fact does not preclude others from using the spectrum for PLMR purposes. Midwest Bell also states that it has no intention to compete with MariTEL in the area of maritime communication services.²² These arguments lack merit. First, the first construction benchmark for a VPC licensee is substantial service within five years.²³ MariTEL still has more than four years to show substantial service, and therefore, has not run afoul of the construction requirement. Consequently, Midwest Bell's argument that it will not cause harmful interference to MariTEL is premature. Second, as previously stated, MariTEL is the holder of the geographic area license in the VPC-005 region, which encompasses Parma, Ohio, and therefore has exclusive rights to those frequencies. The fact that Midwest Bell has no intention of competing or causing harmful interference is irrelevant.

8. Finally, Midwest Bell contends that MariTEL's petition for reconsideration should be dismissed because it failed to file a petition to deny against the Midwest Bell application.²⁴ Specifically,

¹⁷ Opposition at 3. Midwest Bell recognizes that Section 90.283 of the Commission's Rules, which permitted PLMR stations to share maritime frequencies in the 156-162 MHz band, was repealed by the *Third R&O*. *Id.* at 1.

¹⁸ 47 C.F.R. § 90.175(g).

¹⁹ Opposition at 1-2 (citing 47 C.F.R. §§ 90.35, 90.173).

²⁰ See 47 C.F.R. § 90.173(g); see also Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, *Second Memorandum Opinion and Order*, 14 FCC Rcd 8642, 8669 (1999).

²¹ Opposition at 2-3.

²² *Id.* at 3.

²³ 47 C.F.R. § 80.49(a)(1).

²⁴ Opposition at 4.

Midwest Bell argues that because the application was placed on public notice on May 11, 1999, MariTEL should have been aware of the application, and accordingly, should have filed a petition to deny.²⁵ MariTEL, on the other hand, argues that once it was awarded its license, it believed that subsequent applications proposing the use of VPC frequencies in the same area would not be accepted by the Commission.²⁶

9. Section 1.106 of the Commission's Rules provides that in instances where a petition for reconsideration is filed by a person who is not a party to the proceeding, the filer shall show good cause why it was not possible to participate in the earlier stages of the proceeding.²⁷ Thus, when an application appears on public notice, a petitioner who is not a party to a proceeding may not file a petition for reconsideration to set aside the grant of that application in the absence of a showing of good cause.²⁸ Specifically, the party must show good cause explaining why it failed to participate earlier in the proceeding by filing a timely petition to deny.²⁹

10. In the instant case, we find that MariTEL has demonstrated a valid reason for not filing a petition to deny against the Midwest Bell application even though Midwest Bell's application appeared on public notice as accepted. Indeed, MariTEL had no reason to believe that the Commission would accept an application requesting frequencies already authorized exclusively to it, and therefore, did not monitor the public notice or file a petition to deny. Midwest Bell's application, which was erroneously accepted and mutually exclusive on its face with MariTEL's VPC license, should have been dismissed, with or without the filing of a petition to deny, regarding frequencies already licensed to MariTEL.³⁰ Under these circumstances, we conclude that MariTEL had good cause to believe that its participation in the earlier stages of this proceeding was not necessary. Therefore, we accept MariTEL's petition for reconsideration even though it did not file a petition to deny.

11. 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 by WJG MariTEL Corporation on February 18, 2000, IS GRANTED.

²⁵ *Id.*

²⁶ *See* Petition at 3 n.3

²⁷ 47 C.F.R. § 1.106(b)(1).

²⁸ *See* Applications of Sagir, *Order*, 15 FCC Rcd 4466 (CWD WTB rel. Feb. 29, 2000) (holding that a petitioner failed to show good reason why it was not possible for it to participate at the earlier petition to deny stage after a modification application opposed by the petitioner was placed on public notice); Applications of GAP Cellular, *Order*, 15 FCC Rcd 4540 (CWD WTB rel. Mar. 3, 2000) (holding that petitioner failed to demonstrate sufficient cause for failure to file petitions to deny after application opposed by petitioner was placed on public notice and was served upon petitioner).

²⁹ *Id.*

³⁰ 47 C.F.R. § 1.9349(e)(2).

12. IT IS FURTHER ORDERED that the authorization of Midwest Bell Communications to operate Station WPPU614, Parma, Ohio IS SET ASIDE with respect to the frequencies 157.2250 MHz, 157.250 MHz, 157.3250 MHz, 157.3750 MHz, 157.400 MHz, 161.8500 MHz, 161.9250 MHz, 161.9750 MHz, and 162.000 MHz.

13. 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