

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

In the Matter of Application of)
WINSTAR SPECTRUM, LLC) FCC File No. 0000723317
Request for Waivers of Sections 101.55(a),)
101.63(a), 101.65(a) and (b), and 101.305(a))
and (d) of the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 2003

Released: August 7, 2003

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a petition for reconsideration filed by Winstar Spectrum, LLC (New Winstar) on February 13, 2003. New Winstar seeks reinstatement, nunc pro tunc, of 14 common carrier point-to-point Fixed Microwave Service (FMS) licenses and two frequency paths previously authorized under FMS Station WPOR551. The Private Wireless and Public Safety Division (Division) of the Wireless Telecommunications Bureau (Bureau) updated the licensing records for the subject facilities in the Bureau's Universal Licensing System (ULS) on January 27, 2003 based on information before it regarding the status of such authorizations. For the reasons stated below, we grant the Petition.

II. BACKGROUND

2. On April 17, 2002, the Bureau released a Public Notice conditionally consenting to the assignment of licenses from Winstar Communications, Inc. (Old Winstar) to New Winstar. The Public Notice stated that consent to the assignment of licenses was subject to the terms and conditions of related

1 Winstar Spectrum, LLC Petition for Reconsideration (filed Feb. 13, 2003) (Petition).

2 Letter to Philip L. Verveer and Sophie Keefer, Counsel to Winstar Spectrum, LLC (FCC File Nos. 0000723317, 0000721675, 0000721625, 0000721683), from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, dated January 14, 2003 (January 14 Letter). The status of the licenses and frequencies in question were not manually changed in the ULS until January 27, 2003. Frequencies 21225 and 21475 are associated with Station Call Sign WPOR551. The 14 other licenses identified by New Winstar include: WPRT829, WPRT830, WPRU394, WPRU395, WPRU400, WPRV325, WPRV326, WPRW603, WPRW605, WPSE267, WPSE268, WPSE531, and WPSE533. See Attachment.

3 Wireless Telecommunications Bureau Conditions Grant of Assignments of Licenses From Subsidiaries of Winstar Communications, Chapter VII Debtors, to Winstar Spectrum, LLC, a Subsidiary of IDT Corporation, Public Notice, DA 02-895 (April 17, 2002) (Public Notice).

orders released on the same day.⁴ Specifically, the *Public Notice* noted that consent was conditioned, in part, on New Winstar “filing construction notifications pursuant to 47 C.F.R. § 1.946(d) concerning each call sign listed in Appendix B of the [*Build-out Waiver Order*].”⁵

3. In the *Build-out Waiver Order*, the Division stated that because the Commission’s rules prohibit the assignment of unconstructed stations, New Winstar would not be permitted to acquire certain point-to-point microwave licenses that had not been timely constructed.⁶ In this connection, the Division noted that the construction period for several stations subject to the proposed transaction had expired as of April 17, 2002. However, because the Division did not have record on file of either a notification of construction or a request for an extension of time to construct, it was unable to conclude whether these licenses were in fact timely constructed and therefore eligible to be assigned pursuant to the Commission’s rules.⁷ The Division compiled these licenses in a list and attached it to the *Build-out Waiver Order* as Attachment B.⁸ Thus, as a condition to consent to the assignment application, the Division provided New Winstar a limited 30-day window of opportunity to verify the construction status of those stations listed in Appendix B.⁹

4. New Winstar submitted its response to the *Build-out Waiver Order* on May 17, 2002.¹⁰ In its Supplemental Notice, New Winstar provided a list of those stations previously identified in Attachment B of the *Build-out Waiver Order* that had been timely constructed.¹¹ This list also included stations that were constructed timely prior to May 17, 2002, the date New Winstar filed the Supplemental Notice. On June 14, 2002, New Winstar filed a Notice of Consummation for the assignment of the call signs associated with three of four of its pending assignment applications.¹² On December 19, 2003, New Winstar filed a Notice of Construction for frequencies 21225 and 21475 associated with Call Sign

⁴ *Id.* at 2; *See* Winstar Wireless Fiber Corp. and New Winstar Spectrum, LLC Request for Waiver of Sections 101.55(a), 101.63(a), 101.65(a) and (b), and 101.305(a) and (d) of the Commission’s Rules, *Order*, DA 02-894 (rel. April 17, 2002) (*Build-out Waiver Order*); Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission’s Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17; Application for Assignment of Licenses and Authorizations from Winstar LMDS, LLC (Chapter 7 Debtor) to Winstar Spectrum, LLC File No. 0000721683, *Order*, DA 02-887 (rel. April 17, 2002) (*Unjust Enrichment Order*).

⁵ *Public Notice* at 2. Grant of the assignment application was also conditioned on remittance of the unjust enrichment payment. *See Unjust Enrichment Order*, *supra* note 4.

⁶ *Build-out Waiver Order* at ¶ 11; *see* 47 C.F.R. §§ 101.55(d), 101.63(b).

⁷ *Id.* at ¶ 14 n.46.

⁸ *Id.* at ¶ 14.

⁹ *Id.* at ¶ 14.

¹⁰ Winstar Spectrum, LLC *Supplemental Notice of License Construction*, FCC File No. 0000723317 (filed May 17, 2002) (Supplemental Notice). On May 15, 2002, New Winstar filed electronically through the Commission’s Universal Licensing System (ULS) the requisite construction notifications using Schedule K of FCC Form 601 for all licenses listed in Appendix B to the *Build-out Waiver Order*. *See* Supplemental Notice, Exhibit B.

¹¹ *Id.*

¹² Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Philip L. Verveer and Sophie Keefer, Counsel to Winstar Spectrum, LLC (FCC File Nos. 0000723317, 0000721675, 0000721625), dated June 14, 2002.

WPOR551.¹³ In Schedule K of its FCC Form 601, New Winstar stated that these two frequency paths were inadvertently omitted from the Supplemental Notice.¹⁴

5. On January 14, 2003, the Division informed New Winstar, by letter, that it was updating the ULS to reflect its decision in the *Build-out Waiver Order* and in consideration of the Supplemental Notice filed by New Winstar.¹⁵ In the January 14 Letter, the Division stated that “those stations for which Winstar has not notified us of timely construction must be removed from the list of stations that may be transferred to Winstar Spectrum, LLC because the authorizations for these stations have automatically canceled due to the Winstar Licensees’ failure to construct them in a timely manner.”¹⁶

III. DISCUSSION

6. New Winstar seeks reinstatement of two frequency paths associated with Station WPOR551, as well as 14 other licenses that it claims were constructed prior to consummation of the assignment of the licenses.¹⁷ Based on our review of the record as further discussed below, we conclude that, while our action was correct and consistent with the information before us at the time we took such action, the public interest would be furthered by reinstatement of both frequency paths 21225 and 21475 as well as the subject 14 common carrier point-to-point microwave licenses, *nunc pro tunc* under the circumstances presented. Accordingly, we grant the Petition.

7. Because New Winstar did not identify frequency paths 21225 and 21475 in its Supplemental Notice, the Division had no reason to conclude that the frequencies were in fact timely constructed and therefore changed the licensing status in the ULS.¹⁸ New Winstar later subsequently claimed that these frequencies were in fact timely constructed, but were “inadvertently left off of the Supplemental Notice.”¹⁹ Notably, New Winstar does not provide specific for its “inadvertence”, particularly given that the Division had previously given New Winstar 30 days to verify and update the status of licenses associated with the assignment. Nonetheless, while we reprove of New Winstar’s failure to ascertain the accuracy and completeness of its Supplemental Notice, we believe that the public interest is better served by granting rather than denying its request under the circumstances presented.²⁰ In reaching this decision, we find credence in New Winstar’s explanation that the frequencies were in fact timely constructed, and therefore they would have been listed in its Supplemental Notice but for New

¹³ FCC File No. 0001129597.

¹⁴ Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Sophie Keefer, Counsel to Winstar Spectrum, LLC, Schedule K Attachment to FCC Form 601 (filed on ULS Dec. 19, 2002) (Schedule K Letter).

¹⁵ January 14 Letter, *supra* note 2.

¹⁶ *Id.* at 2 n.9 and citing *Build-out Waiver Order* at ¶ 13 (“[i]f the stations were not constructed . . . then the authorizations for such stations canceled automatically and there is nothing to be assigned”).

¹⁷ *See* Petition at 4.

¹⁸ In the January 14 Letter, the Bureau stated that “those stations for which Winstar has not notified us of timely construction must be removed from the list of stations that may be transferred to Winstar Spectrum, LLC because the authorizations for these stations have automatically cancelled due to the Winstar Licensees’ failure to construct them in a timely manner.” January 14 Letter at 2.

¹⁹ Petition at 4. On December 19, 2002, New Winstar filed notifications of construction for frequencies 21225 and 21475. *See* Schedule K Letter at 2.

²⁰ Specifically, as noted in the *Build-out Waiver Order*, New Winstar stated that, “[g]iven the rapid deterioration of Winstar’s financial situation, its loss of employees, and the sale of its assets . . . , it has been impossible to survey comprehensively the status of all license, confirm full construction and report to the FCC in connection with the transfer.” *Build-out Waiver Order* at ¶ 4 and n.16, citing Winstar’s Waiver Request at 9.

Winstar's clerical oversight. Because we find no reason consistent with the public interest to deny New Winstar's request, we hereby grant the request and reinstate frequency paths 21225 and 21475 associated with Station WPOR551.

8. We now turn our attention to New Winstar's request for reinstatement of 14 point-to-point common carrier microwave stations. In the January 14 Letter, we stated that "those stations for which Winstar has not notified us of timely construction must be removed from the list of stations that may be transferred to Winstar Spectrum, LLC because the authorizations for these stations have automatically canceled due to the Winstar Licensees' failure to construct them in a timely manner."²¹ Accordingly, we changed the status of the 14 station licenses, along with frequencies 21225 and 21475, in the ULS.²² By way of explanation, New Winstar states that these 14 station licenses were not included in its Supplemental Notice because the construction period for those particular licenses had not yet expired at either the time we released the *Build-out Waiver Order* or prior to the date New Winstar had submitted its Supplemental Notice.²³ As support, New Winstar relies on the language of the *Build-out Waiver Order* where the Division requested New Winstar to "provide supplemental information as to whether the stations for which the construction period has already expired [as listed in Appendix B] were constructed in a timely manner."²⁴

9. We do not dispute the fact that the construction period of the 14 licenses in question had not expired at the time New Winstar filed its Supplemental Notice. Nor do we dispute the fact that because these licenses were not listed in Attachment B, that they were not subject to the due diligence aspect of the *Build-out Waiver Order*. But notwithstanding these facts, there is no basis for New Winstar to assume that the Division waived, on its own and without discuss, any of the Commission's rules with respect to the remainder of licenses subject to the underlying transaction.²⁵ New Winstar states that because we had not specifically asked about the construction status of the 14 licenses by way of including them in Attachment B of the *Build-out Waiver Order*, it was not required to report on the construction status of those licenses.²⁶ Although New Winstar was not necessarily required to report on the construction status of those licenses at the time it submitted its Supplemental Notice, to the extent that any of the licenses were in fact subsequently constructed, New Winstar was obligated under the Commission's rules to notify the Commission of timely construction.²⁷

10. Specifically, the Commission's rules require a licensee to demonstrate that construction has in fact been completed via a timely filed notice of construction on FCC Form 601.²⁸ This notification serves as indicia of construction, and in the absence of such notice, the Commission cannot be credited with the prescience to know whether in fact a station is timely constructed or not. Here, the Commission relies on the affirmative disclosures made to it by the licensee as required by the applicable rules and regulations. With regard to the 14 licenses in question, such information was lacking: By its own admission, New Winstar states that it "failed to file notices of completion of construction, so the Commission had no independent information upon which to ascertain whether these licenses had been

²¹ January 14 Letter at 2.

²² See *supra* note 18.

²³ Petition at 5.

²⁴ Petition at 2 citing *Build-out Waiver Order* ¶ 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See 47 C.F.R. § 1.946(d).

²⁸ *Id.*

constructed in a timely manner.”²⁹ Accordingly, because the Division lacked information that the facilities associated with the 14 licenses at issue had been time constructed, the Division updated the licensing records in the ULS to so reflect.³⁰

11. While we find no fault with our decision in light of the information then before us, we believe that the same public interest reasons supporting New Winstar’s request with respect to the two frequencies discussed above, are equally applicable here to warrant reinstatement of these 14 licenses.³¹ In arriving at this decision, we also credit New Winstar with its statement that the 14 licenses in question were in fact constructed prior to consummation of the assignment in compliance with our rules, and that official notice of construction to the Commission was belatedly withheld to avoid “the appearance of seeking to consummate those licenses that [as determined by the Bureau’s January 14 Letter] remained unconstructed.”³²

IV. CONCLUSION

12. Because we find that reinstatement of the two frequencies and 14 other licenses subject to the instant transaction would serve the public interest, New Winstar’s petition for reconsideration is granted. We therefore reinstate *nunc pro tunc* the subject frequencies and 14 licenses as listed in the Attachment to this Order. Further, consistent with our rules, New Winstar is hereby requested to file notices of construction, including actual date of construction, as well as notices of consummation for the frequency paths and 14 licenses listed in the Attachment within 30 days from the release of this Order.³³ Failure to submit notices of construction and or notices of consummation within the time permitted by this Order will cause the subject licenses to revert to the *status quo ante* for failure to construct.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i), 309 and Sections 1.946(d), 101.55(a), 101.63(a), 101.65(a) and (b), and 101.305(a) and (d) of the Commission’s Rules, 47 C.F.R. §§ 1.946(d), 101.55(a), 101.63(a), 101.65(a) and (b), and 101.305(a) and (d), the Petition for Reconsideration filed by Winstar Spectrum, LLC, on February 13, 2003, IS GRANTED.

²⁹ Petition at 5-6 and n.13.

³⁰ A licensee is also obligated to update its records before the Commission and to make certain that the information submitted thereto is timely, complete and accurate. *See* 47 C.F.R. § 1.65 (stating that each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application). *See* 47 C.F.R. § 101.305.

³¹ *See supra* ¶ 9.

³² Petition at 3.

³³ Because the ULS will treat the notices of construction as late-filed, for purposes of processing the call signs subject to this Order and consistent with our ministerial duties, we will treat the Petition as a waiver request of the Commission’s rules governing license construction and coverage requirements pursuant to 47 C.F.R. § 1.946.

14. 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

ATTACHMENT

WPOR551, frequency 21225

WPOR551, frequency 21475

WPRT829

WPRT830

WPRU394

WPRU395

WPRU398

WPRU400

WPRV325

WPRV326

WPRW603

WPRW605

WPSE267

WPSE268

WPSE531

WPSE533