

ORIGINAL
WILLKIE FARR & GALLAGHER

EX PARTE OR LATE FILED

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

RECEIVED

MAR 13 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

March 13, 2001

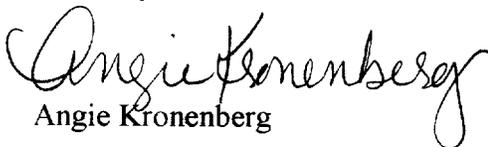
Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 00-230 Ex Parte

Dear Ms. Salas:

Winstar Communications, Inc. filed Reply Comments in WT Docket No. 00-230 on March 12, 2001. It attached to its Reply Comments recommended modifications to the Commission's rules. To aid the Commission in its consideration, Winstar is providing those modifications as blacklined against the Commission's current rules as an attachment to this letter.

Sincerely,


Angie Kronenberg

Attachment

No. of Copies rec'd at 2
UNACODE

Washington, DC
New York
Paris
London

**Proposed Rule Modifications
Secondary Markets NPRM
WT Docket No. 00-230**

I. Part 1 Rule Modifications

Modify the “authorization required” rule to recognize that spectrum may be used by third parties pursuant to secondary arrangements.

§ 1.903 Authorization Required.

(a) General rule. Stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service as set forth in this title and with a valid authorization granted by the Commission under the provisions of this part, except as specified in paragraph (b) of this section. However, stations in the Wireless Radio Services may be operated by third parties pursuant to secondary arrangements with licensees as set forth in § 1.904 of this chapter.

Insert rule permitting Wireless Radio Service licensees to enter into secondary arrangements with third parties to use their spectrum:

§ 1.904 Secondary Arrangements.

(a) Licensees in the Wireless Radio Services may enter into secondary arrangements whereby third parties can use a licensee’s spectrum in whole or in part. The types of secondary arrangements licensees may enter into include, but are not limited to, leases, franchises, or joint operating agreements.

(b) Licensees entering into secondary arrangements will be found to have maintained control of their licenses as required by Section 310(d) of the Communications Act if they retain de jure control (i.e., legal ownership) of their licenses; the Wireless Telecommunications Bureau is notified of the secondary arrangements pursuant to subsection (e) of this rule; and the licensees meet a reasonable standard of care for their licenses (i.e., they do not enter into a lease knowing the lessee will use the spectrum for unlawful purposes).

(c) To the extent authorized by the licensee, a third party who has a secondary arrangement with a licensee may enter into a sublease with another party to use the spectrum.

(d) Restrictions. Neither a secondary arrangement nor sublease creates any rights beyond the terms, conditions and period specified in a licensee’s authorization.

(e) Within 30 days of the effectiveness of a secondary or sublease arrangement, the licensee, lessee, or sublessee shall notify the Wireless Telecommunications Bureau of the arrangement and provide the following information:

(i) the licenses/spectrum, including any applicable call signs, to which a lease or sublease applies; and

_____ (ii) the name, address, and phone number of the lessee/sublessee; and

_____ (iii) the name, address, and phone number of the contact person for the lessee/sublessee.

(f) The Bureau will publish the notices received regarding secondary arrangements on a weekly basis.

Add definition of a "Lessee" in Part 1 of the FCC's Rules:

§ 1.907 Definitions.

Lessee. A lessee is a third party, including any sublessee, that has agreed to use the spectrum of a licensee in whole or in part, while the licensee retains the license. Such agreements include, but are not limited to leases, franchises, or joint operating agreements.

As demonstrated in Winstar's Comments and the Comments of the 37 Concerned Economists, the use of construction and coverage requirements is not necessary when the FCC uses market-based spectrum policies because the spectrum will be developed and used as the market demands. Thus, it is appropriate for the FCC to delete the requirements of §1.946. However, to the extent the FCC maintains its construction and coverage requirements, it should permit licensees to rely upon a lessee's construction and service.

§ 1.946 Construction and Coverage Requirements.

(c) Reliance on Lessee's Construction. Licensees may rely upon the construction and service of lessees using spectrum covered by the license at issue to fulfill their own construction, commencement of service, coverage, or substantial service requirements.

~~(e)~~ (d) *Termination of authorizations.* If a licensee fails to commence . . .

Include lessees in the rule which requires licensees and applicants to respond to official communications from the FCC:

§ 1.951 Duty to respond to official communications.

Licensees, lessees, or applicants in the Wireless Radio Services receiving official notice of an apparent or actual violation of a federal statute, international agreement, Executive Order, or regulation pertaining to communications shall respond in writing within 10 days to the office of the FCC originating the notice, unless otherwise specified. Responses to official communications must be complete and self-contained without reference to other communications unless copies of such other communications are attached to the response. Licensees, lessees, or applicants may respond via ULS.

II. Part 101 Rule Modifications

Add definition of "lessee" in Part 101:

§ 101.3 Definitions

As used in this part:

Lessee. A lessee is a third party, including any sublessee, that has agreed to use the spectrum of a licensee in whole or in part, while the licensee retains the license. Such agreements include, but are not limited to leases, franchises, or joint operating agreements.

Modify the performance requirement rule as follows:

~~§ 101.17 Performance requirements for the 38.6-40.0 GHz frequency band.~~

~~(a) All 38.6-40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each EA or portion of an EA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rise to the level of "substantial."~~

~~(1) A description of the 38.6-40.0 GHz band licensee's current service in terms of geographic coverage;~~

~~(2) A description of the 38.6-40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term;~~

~~(3) A description of the 38.6-40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required);~~

~~(b) Any 38.6-40.0 GHz band licensees adjudged not to be providing substantial service will not have their licenses renewed.~~

§ 101.17 Criteria for renewal expectancy for the 38.6-40.0 GHz frequency band.

A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, that is the most important comparative factor to be considered in the proceeding as long as the applicant's past record for the relevant license period demonstrates that:

(1) The renewal applicant has substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended; and

(2) The renewal applicant has not otherwise engaged in substantial relevant misconduct in relation to the license.

Modify reference to build-out requirements for partitioned and disaggregated spectrum:

§ 101.56 Partitioned service areas (PSAs) and disaggregated spectrum.

(g) The ~~build-out requirements-renewal expectancy requirements~~ for the partitioned service area or disaggregated spectrum shall be the same as applied to the EA authorization holder.

Clarify that area-wide licensees will not forfeit their licenses if they alter or remove facilities or discontinue operations on any one radio station. The current requirement is burdensome for area-wide licensees that may have numerous operating stations in an area and may want to discontinue operations of a station in response to consumer demand. Moreover, the requirement is inconsistent with the flexibility proposed in the secondary markets proceeding.

§ 101.65 Forfeiture and termination of station authorizations.

(a) In addition to the provision of § 1.955 of this chapter, except in the Local Multipoint Distribution Services, 24 GHz Service and the 38.6-40.0 GHz band, a license will be automatically forfeited in whole or in part without further notice to the licensee upon the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more.

(b) Pursuant to § 1.955 of this chapter, except in the Local Multipoint Distribution Services, 24 GHz Service and the 38.6-40.0 GHz band, if a station licensed under this part discontinues operation on a permanent basis, the licensee must cancel the license. For purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued. See § 101.305 for additional rules regarding temporary and permanent discontinuation of service.

Insert a general reference to lessees in the frequency coordination procedures of § 101.103:

§ 101.103 Frequency coordination procedures.

For purposes of this rule, the term licensee(s) includes lessee(s), unless specifically noted otherwise. Pursuant to § 1.904, the Wireless Telecommunications Bureau must receive notice of leases and make such information available to other spectrum users. For purposes of coordinating spectrum and relying upon the procedures herein, coordinating parties must have notice of lessee information. Coordinating parties that rely upon the contact information provided by the Bureau to coordinate their facilities will be presumed to have met their obligations under this rule.

Include reference to Rectangular Service Areas in § 101.103 to clarify that this rule applies to incumbent as well as auction licensees and add new clause to clarify how long parties may rely upon coordination before facilities are put into operation:

(i)(1) When the licensed facilities are to be operated in the band 38,600 MHz to 40,000 MHz and the facilities are located within 16 kilometers of the boundaries of an Economic Area or Rectangular Service Area, each licensee must complete the frequency coordination process of subsection 101.103(d) with respect to neighboring EA licensees and existing licensees within its EA service area that may be affected by its operation prior to initiating service

(3) If operations have not commenced within 12 months after coordination has been completed, parties may assume that such facilities will not be operated and the party requesting coordination will lose its priority.

Delete subsection (b) in § 101.149 which requires each operating station in the 38.6-40.0 GHz band, LMDS bands, and the 24 GHz band to have posted a copy of the service area authorization. Such a requirement is burdensome for area-wide licensees that have numerous operating stations in an area and is inconsistent with the flexibility proposed in the secondary markets proceeding.

Include a reference to lessees in the rule which requires licensees to submit to FCC inspection:

§ 101.201 Station inspection.

The licensee or lessee of each station authorized in the radio services included in this part must make the station available for inspection by representatives of the Commission at any reasonable hour.

Ensure that upon detection of unauthorized transmission both licensees and lessees have an obligation to suspend those transmissions:

§ 101.207 Suspension of transmission.

Transmission must be suspended immediately upon detection by the ~~a station or~~ operator ~~licensee~~ or upon notification by the Commission of a deviation from the technical requirements of the station authorization and must remain suspended until such deviation is corrected, except for transmission concerning the immediate safety of life or property, in which case transmission must be suspended immediately after the emergency is terminated.

Include a reference to lessees in the rule governing operator requirements:

§ 101.211 Operator requirements.

(a) Any person, with the consent or authorization of the licensee or lessee, may employ stations in this service for the purpose of telecommunications with the conditions and limitations set forth in § 101.135.

(b) The station licensee or lessee is responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation.

~~(c) The provisions of paragraph (a) of this section may not be construed to change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof) in accordance with the terms of the licenses of those stations. All persons operating stations (including all transmitter units thereof) must ensure the proper functioning and operations of those stations in accordance with the terms of the licenses of those stations.~~

Exempt the operators in the 38.6-40.0 GHz band, LMDS bands, and the 24 GHz band from posting station authorizations at radio stations and from keeping detailed information about the stations. As stated above, these types of requirements are burdensome for area-wide licensees that have numerous operating stations in an area and are inconsistent with the flexibility proposed in the secondary markets proceeding.

§ 101.215 Posting of station authorization and transmitter identification cards, plates, or signs.

(b) The requirements in paragraph (a) of this section do not apply to remote stations using frequencies listed in § 101.147(b) or to Local Multipoint Distribution Services, 24 GHz Service and operations in the 38.6-40.0 GHz band.

§ 101.217 Station records.

Each licensee of a station subject to this part, except those operators in the Local Multipoint Distribution Services, 24 GHz Service and the 38.6-40.0 GHz band, shall maintain records in accordance with the following:

Modify the discontinuance, reduction or impairment of service rule to delete subsection (a) which requires notification to the FCC for every station of a common carrier licensee that experiences such occurrences. This is burdensome for area-wide licensees that maintain numerous radio stations and may alter the arrangement of their radio stations based on consumer demand. They should not be required to inform the FCC each time they power down or cease to use a particular radio station in an area. The Commission need only require that licensees subject to Title II obtain FCC authorization before discontinuing or severely reducing their service to a community.

§ 101.305 Discontinuance, reduction or impairment of service.

~~(a) If the public communication service provided by a station in the Common Carrier Radio Services and the Local Multipoint Distribution Service is voluntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee must promptly notify the Commission. In every such case, the licensee must furnish full particulars as to the reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof must be given to the Commission.~~

(b) (a) No station licensee subject to Title II of the Communications Act of 1934, as amended, may voluntarily discontinue or severely reduce public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in part 63 of this chapter. In the event that permanent discontinuance of service is authorized by the Commission, the station license is terminated, ~~except that station licenses in the Local Multipoint Distribution Service are not terminated if the~~ where discontinuance is a result of a change of status by the licensee from common carrier to non-common carrier.

(e) (b) Any licensee not subject to Title II of the Communications Act of 1934, as amended, who voluntarily discontinues or severely reduces public communication service to a community or part of a community must notify the Commission within 7 days thereof. In the event of permanent discontinuance of service, the station license is automatically terminated, except where discontinuance is a result of a change of status by the licensee from non-common carrier to common carrier.

(d) (c) Except in the Local Multipoint Distribution Services, 24 GHz Service and the 38.6-40.0 GHz band, if any common carrier radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed under circumstances that do not fall within the provisions of paragraph (a), (b), or (c) of this section, or, if removal of equipment or facilities has rendered the station not operational, the licensee must, within thirty days of the end of such period of nonuse:

(1) Cancel the station license (or licenses); or

(2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or

(3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.

Insert requirement that lessee, in addition to licensees, must respond to official communication:

§ 101.309 Requirement that licensees and lessees respond to official communications.

All licensees and lessees in these services are required to respond to official communications from the Commission with reasonable dispatch and according to the tenor of such communications. Failure to do so will be given appropriate consideration in connection with any subsequent applications which the offending party may file and may result in the designation of such applications for hearing, or in appropriate cases, the institution of proceedings looking to the modification or revocation of the pertinent authorizations.

Insert reference to lessees in the rule governing construction and operation of systems:

§ 101.1009 System operations.

(a) The licensee or lessee may construct and operate any number of fixed stations anywhere within the area authorized by the license without prior authorization, except as follows:

(1) A station would be required to be individually licensed if:

- (i) International agreements require coordination;
- (ii) Submission of an Environmental Assessment is required under § 1.1307 of this chapter.
- (iii) The station would affect the radio quiet zones under § 1.924 of this chapter.

(2) Any antenna structure that requires notification to the Federal Aviation Administration (FAA) must be registered with the Commission prior to construction under § 17.4 of this chapter.

(b) Whenever a licensee or lessee constructs or makes system changes as described in paragraph (a) of this section, the licensee or lessee is required to notify the Commission within 30 days of the change under § 1.947 of this chapter and include a statement of the technical parameters of the changed section.

Modify the performance requirements rule for the LMDS service as follows:

~~§ 101.1011 Construction requirements and criteria for renewal expectancy.~~

~~(a) LMDS licensees must make a showing of "substantial service" in their license area within ten years of being licensed. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.~~

~~(b) A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, that is the most important comparative factor to be considered in the proceeding as long as the applicant's past record for the relevant license period demonstrates that:~~

~~(1) The renewal applicant has providing "substantial" service during its past license term; and~~

~~(2) The renewal applicant has substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.~~

~~(c) In order to establish its right to a renewal expectancy, an LMDS renewal applicant involved in a comparative renewal proceeding must submit a showing explaining why it should receive a renewal expectancy. At a minimum, this showing must include:~~

~~(1) A description of its current service in terms of geographic coverage and population served;~~

~~(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;~~

~~(3) A description of its investments in its LMDS system; and~~

~~(4) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.~~

~~(d) In making its showing of entitlement to a renewal expectancy, a renewal applicant may claim credit for any system modification applications that were pending on the date it filed its renewal application. Such credit will not be allowed if the modification application is dismissed or denied.~~

§ 101.1011 Criteria for renewal expectancy.

A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, that is the most important comparative factor to be considered in the proceeding as long as the applicant's past record for the relevant license period demonstrates that:

(1) The renewal applicant has substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended; and

(2) The renewal applicant has not otherwise engaged in substantial relevant misconduct in relation to the license.