

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

In the Matter of

MCI File Nos. 2328 through 2330-CF-P-87
TELECOMMUNICATIONS 2333-CF-P-87
CORP. 2348 and 2349-CF-P-87
2356 and 2357-CF-P-87
2395 through 2406-CF-P-87
2491 and 2492-CF-P-87
2521 through 2526-CF-P-87
2544 through 2555-CF-P-87
2603-CF-P-87
2984 and 2985-CF-P-87
3271 through 3274-CF-P-87
3276 through 3278-CF-P-87
3279 through 3280-CF-P-87
3281 through 3295-CF-P-87
3311 through 3324-CF-P-87
3326 and 3327-CF-P-87
3328 and 3329-CF-P-87
3337 through 3339-CF-P-87

Applications For Construction
Permits in the Point-to-Point
Microwave Radio Common Carrier
Service

MEMORANDUM OPINION AND ORDER

Adopted: January 13, 1989; Released: January 26, 1989

By the Chief, Common Carrier Bureau:

1. On or about July 17, 1987, TeleSTAR, Inc. (TeleSTAR) filed a document titled "Exception to Granting Conditional Licenses to MCI for New Construction or Station Modifications" (exception) challenging the action taken by the Common Carrier Bureau's Domestic Facilities Division (Division) granting to MCI Telecommunications Corp. (MCI), on a conditional basis, the above-captioned point-to-point microwave radio service (PPMRS) common carrier applications.¹ This order reviews the arguments advanced by TeleSTAR and concludes that the Division's action should be affirmed.²

2. The Commission's Rules of Practice and Procedure, 47 C.F.R. § 1.1-1.1712, do not recognize the filing of "exceptions" in the type of proceeding now before the Common Carrier Bureau. Section 1.276 of the rules provides that "exceptions" may be filed only by parties seeking to appeal an initial decision rendered by an Administrative Law Judge. 47 C.F.R. § 1.276. Because the case before us does not arise from such a proceeding, TeleSTAR's filing of "exceptions" is improper. Nevertheless, in the interest of fairness to TeleSTAR, although

captioned "exception," we will waive the rules and address its arguments as a petition for reconsideration. See 47 C.F.R. §§ 1.3, 1.106.

I. BACKGROUND

3. On March 25, 1987, TeleSTAR filed a "Petition for Revocation of FCC Operating Authority for MCI" (revocation petition) requesting immediate suspension and revocation of point-to-point microwave license authorizations issued to MCI. The petition alleged, *inter alia*, that MCI knowingly violated Section 319(a) of the Communications Act of 1934, as amended (the Act) and numerous FCC regulations and requirements, including the Section 21.3(a) prohibition against construction and operation of facilities without authorization, and the Section 21.100(d) requirements concerning frequency coordination with existing facilities prior to filing an application. The allegations made by TeleSTAR pertained to MCI's conduct in obtaining several point-to-point microwave service (PPMS) authorizations on specified microwave routes. In addition, TeleSTAR maintained that MCI violated local county building and zoning ordinances and misrepresented its various purported violations to the Commission. Furthermore TeleSTAR contended that MCI exhibited a lack of candor with the Commission in obtaining these authorizations. TeleSTAR argued that MCI's conduct in obtaining these authorizations demonstrated a pattern of knowing and deliberate disregard for Commission rules and regulations and raised a serious question regarding MCI's character qualifications to be a licensee. MCI and TeleSTAR filed various responsive pleadings. On January 25, 1988, the Commission issued a decision denying TeleSTAR's request to initiate a revocation proceeding against MCI under Section 312 of the Act. In that decision, the Commission did find certain isolated violations of Section 319(a) of the Act and Commission rules by MCI.³ At the same time, it concluded that MCI had neither intentionally deceived or misrepresented matters relative to its applications, nor evidenced lack of candor in the matters alleged so as to cause the Commission to doubt its propensity for truthfulness as a licensee. See *MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988), as supplemented, FCC 88-49, released Feb. 18, 1988 (*MCI NAL*), appeal pending sub. nom, *TeleSTAR v. FCC*, No. 88-1153 (D.C. Cir.).

4. In May and June 1987, subsequent to the filing of the revocation petition, TeleSTAR filed several Petitions to Deny the above-captioned applications of MCI for eighteen new, or modifications to, eighty-eight repeater stations on the grounds that the allegations enumerated in the revocation petition also warranted denial of MCI's pending applications. TeleSTAR made no specific allegations of misconduct or rule violations by MCI with respect to the applications in question. Rather, it concluded that, on the basis of the allegations made in the revocation proceeding, MCI should be disqualified from obtaining the above-referenced authorizations. In opposition,⁴ MCI maintained that TeleSTAR failed to raise any substantive grounds to justify denial of its pending applications or to demonstrate any specific connection between the allegations of misconduct made in the revocation petition and the subject applications. MCI argued further that, inasmuch as the Commission had not made a determination regarding the merits of the contentions raised by TeleSTAR in the revocation proceeding, it would be in-

appropriate to deny MCI's pending applications. Moreover, MCI asserted that even if the Commission rendered a decision adverse to it in the revocation proceeding, Commission policy, notably in the broadcast area, does not presume that a finding of misconduct at one station is necessarily predicative of the operation of a licensee's other stations, citing *Policy Regarding Character Qualification in Broadcast Licensing*, 102 FCC 2d 1179, 1223, *aff'd on recon.*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association of Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. 1987). Alternatively, MCI suggested that the Bureau grant, on a conditional basis, its applications pending the resolution of the issues raised in the revocation proceeding. According to MCI, this option would allow the Commission to consider the charges levied by TeleSTAR against MCI while not undermining the interests of the public in continuing to receive the telecommunications services offered by MCI. TeleSTAR opposed MCI's request for conditional grants on the grounds that, given the serious nature of the alleged violations raised in the revocation proceeding and the relevance of those issues to the Commission's consideration of whether the grant of MCI's applications is in the public interest, any conditional grants of new applications to MCI would be premature and contrary to Sections 309 and 312 of the Act. TeleSTAR requested that MCI's applications be denied or designated for hearing. In response to TeleSTAR's opposition, MCI took issue with TeleSTAR's claim that a grant of its applications would be premature under the circumstances. MCI claimed that TeleSTAR erroneously asserted that the Commission is bound, as a matter of law, to withhold action on the applications against which TeleSTAR has filed its Petitions to Deny due to the character issues it raised in the revocation proceeding.

5. On June 26, 1987, MCI filed a letter providing further support for conditional grants of its pending applications. According to MCI, to otherwise "freeze" the processing of its applications would have a deleterious impact on the quality and degree of service provided to end-users. In response to MCI's renewed request for conditional grants, TeleSTAR restated its view that the issuance of conditional grants would be premature and contrary to Sections 309 and 312 (a) of the Act.⁵ TeleSTAR also stated that due to the "substantial and material" allegations of fact raised against MCI, Section 309 requires that the Commission either deny or designate for hearing the pending applications filed by MCI. In the Reply, dated July 6, 1987, MCI disputed TeleSTAR's contention that the Commission is without legal authority to authorize conditional grants of applications against which Petitions to Deny have been filed. To support this contention, MCI cited numerous Commission precedents illustrative of circumstances in which the Commission has made conditional grants to an applicant pending final disposition of a challenge to the qualifications of an applicant to be a Commission licensee. Also, MCI maintained that the Commission is not bound to withhold action on an application against which a petition has been filed because it has the authority under Section 319 (d) of the Act to waive the requirement of a construction permit application.

6. After consideration of the arguments made by the parties, the Division, by letter dated July 10, 1987, concluded that MCI's request for conditional grants was warranted and authorized the grant of some, but not all, of

MCI's applications conditioned on the outcome of the *MCI NAL* proceeding.⁶ It is this action which TeleSTAR challenges as being unauthorized under Section 309 of the Act and inconsistent with Section 312 of the Act.

II. DISCUSSION

7. In the "exception" TeleSTAR argues that the Division acted improperly in conditioning MCI's authorization. TeleSTAR, in its pleadings in the *MCI NAL* proceeding, also made this contention to which the Commission replied that the Division's conditioning action was "entirely appropriate . . ." *MCI NAL* at n.17. The issue has thus already been decided by the Commission. The Commission's decision that conditioning MCI's authorizations on the outcome of the *MCI NAL* proceeding was proper is consistent with the Commission precedent. *See, e.g., Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 513, 520 n.19, 522 (1982).

8. Having disposed of the issue raised by TeleSTAR with respect to the propriety of the conditioning, we address the question of whether the decision in *MCI NAL* requires further Section 309 proceedings regarding MCI's conditional authorizations. As previously mentioned, the Commission addressed this question in *MCI NAL*, and concluded that neither the isolated violations nor TeleSTAR's allegations for which no violations were found raised substantial and material questions of fact requiring a hearing into MCI's qualifications. In that decision, the Commission noted that

[If] we were evaluating TeleSTAR's allegations under Section 309(e) of the Act, we would find no basis for initiating revocation proceedings based on the facts before us. The isolated violations at issue here do not warrant the inference that MCI is not qualified to be a Commission licensee. In addition, with respect to those allegations for which we find no violations, we would also conclude, if applying the Section 309(e) standard, that no substantial and material questions of fact have been raised that would require a hearing to determine whether such violations occurred.⁷

9. Finally, we note that TeleSTAR also argues that the conditional grants to MCI should be revoked pursuant to Section 312(a). The Commission has already decided that the underlying MCI behavior at issue here does not justify revocation. *See MCI NAL*. Accordingly, TeleSTAR's argument in this regard is rejected.

10. Accordingly, IT IS ORDERED that the "Exception to Granting Conditional Licenses to MCI for New Construction or Station Modifications" filed by TeleSTAR, Inc. IS DENIED, and the Division's conditional grant authorizations ARE AFFIRMED.⁸

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

¹ It is difficult to ascertain the precise date of TeleSTAR's filing of the "Exception" because there is no record of the document being officially filed at the FCC. See Section 0.401(a)(1)(i), 47 C.F.R. § 0.401(a)(1)(i). Nevertheless, since we informally received a copy of the "Exception", we shall consider the document in the interest of treating TeleSTAR fairly.

² The first ten above-referenced applications or application sets were conditionally granted to MCI by letter dated July 10, 1987. The remaining eight applications or application sets were conditionally granted to MCI by letter dated July 31, 1987.

³ The Commission found the following violations against MCI: (1) violations of premature and/or unauthorized construction on four routes; (2) unauthorized operation of facilities on two routes; (3) failure to timely file a license application to cover a construction permit; (4) failure to disclose unresolved frequency coordination disputes on two occasions; and (5) on four occasions, incorrectly indicating in FCC Application Form (FCC Form 435) that the site involved the use of federal lands. Of these violations, only two were found to be actionable under the statute of limitations regarding forfeitures imposed by Section 503(b) of the Act. For those violations the Commission issued a Notice of Apparent Liability for forfeiture in the amount of \$10,000. MCI has paid the forfeiture assessed against it.

⁴ MCI Opposition to Petition to Deny, File Nos. 2521 through 2526-CF-P-87, filed May 29, 1987.

⁵ TeleSTAR's Reply, dated July 2, 1987.

⁶ The following applications were granted on July 10, 1987:

File Nos.

2328 through 2330-CF-P-87	2491 and 2492-CF-P-87
2333-CF-P-87	2521 through 2526-CF-P-87
2348 and 2349-CF-P-87	2544 through 2555-CF-P-87
2356 and 2357-CF-P-87	2603-CF-P-87
2395 through 2406-CF-P-87	2984 and 2985-CF-P-87

Each of these applications had been listed on Public Notice as acceptable for filing and had been determined to be not mutually exclusive with any other pending applications. The Division found that the thirty-day public notice and comment period required by Section 21.27 of the rules had not expired for several other pending applications for which MCI requested conditional grant authorizations. As to these applications, the Division declined to issue conditional grants until the thirty-day notice and comment period had expired. See Letter to MCI dated July 28, 1987 in which the remaining applications were granted on a conditional basis.

⁷ MCI NAL at n.18.

⁸ We note that the grants remain conditioned on the outcome of TeleSTAR's pending appeal of MCI NAL.