

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

In the Matter of	)	
	)	File No. 05878-CL-MP-92
USVI Cellular Telephone Corporation	)	
Station KNKN524, Market No. 730A	)	
	)	
Application for Major Modification	)	
of License	)	
	)	

**ORDER**

**Adopted:** December 11, 1996

**Released:** December 11, 1996

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. In this Order, we address a petition to deny ("Petition") filed by CCT Boatphone, Limited ("Boatphone") on June 26, 1992, against the major modification application of USVI Cellular Telephone Corp. ("USVI") to add an additional cell site in the United States Virgin Islands 1 - St. Thomas Island RSA (Market 730A) at a location designated as Mamey Peak. USVI claims that it needs the additional cell to provide more reliable service to certain of its customers.<sup>1</sup> Boatphone, the provider of service to the British Virgin Islands, alleges that a grant of USVI's application would cause interference to Boatphone's cellular system.<sup>2</sup> For the reasons discussed below, we grant USVI's application and deny Boatphone's petition.

**II. Background**

2. Boatphone, a corporation organized under the laws of the British Virgin Islands,<sup>3</sup> provides cellular service to the British Virgin Islands and its surrounding waters pursuant to

---

<sup>1</sup> See, e.g., USVI Opposition to Petition at ii.

<sup>2</sup> Petition at 1.

<sup>3</sup> *Id.* at 1, n.1.

authority from the government of the British Virgin Islands.<sup>4</sup> Boatphone claims that USVI's proposal would cause substantial interference to its service area.<sup>5</sup> Boatphone alleges that USVI is illegally extending its service into the British Virgin Islands and that the small amount of customers it would gain in its own service area does not justify the substantial harm it would do to Boatphone.<sup>6</sup> Specifically, Boatphone claims that the proposed cell will cut into revenues it receives from the tourist industry from charter boats and cruise ships based on the island of Tortola and international travelers in the Drake Channel.<sup>7</sup>

3. USVI responds that a grant of its application is necessary so that it may adequately serve its subscribers that are situated at the eastern end of the island of St. John as well as boaters navigating in U.S. waters off that portion of the island.<sup>8</sup> It further states that the extremely rugged terrain of the Virgin Islands necessitates the cell site at Mamey Peak to ensure that USVI's signal penetrates the natural shielding of the numerous valleys and coves at the eastern end of St. John.<sup>9</sup> USVI acknowledges that an "inevitable consequence of USVI's efforts to provide ubiquitous service within RSA Market No. 730 is that USVI will not be able to confine its signal" so as not to overlap portions of the island of Tortola, where Boatphone is presently authorized by the government of the British Virgin Islands to provide service.<sup>10</sup> USVI maintains that because of the topography of the Virgin Islands, some slight encroachment is inevitable if it is to adequately serve its customers on the eastern end of the island.<sup>11</sup> USVI also questions whether Boatphone, as a foreign corporation, and not a U.S. licensee subject to the Communications Act,<sup>12</sup> has standing to file a petition to deny under the Commission's rules.<sup>13</sup>

4. Since the conclusion of the pleading cycle, two settlement conferences with the parties were held on April 19, 1995 and August 25, 1995. As a result, on August 15, 1995 and February 12, 1996, the Commercial Wireless Division granted two Special Temporary Authorities to USVI for the purpose of allowing the parties to conduct engineering tests to settle their dispute. The

---

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> Reply at 1.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> Opposition at ii.

<sup>9</sup> *Id.*

<sup>10</sup> Opposition at iii.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 3, n.2.

<sup>13</sup> *Id.*

parties have been unable to settle. On April 26, 1996, USVI reported on its test results and requested that the Division expedite a grant of its application.<sup>14</sup> USVI claims that at the requested 35 watt power level, USVI's signal will not interfere with Boatphone's cellular service to its customers.<sup>15</sup> According to USVI, the testing demonstrated that the currently authorized facility at Mamey Peak, which uses a reflectorized antenna and operated at 8.9 Watts ERP, provides a sporadic signal at best for USVI.<sup>16</sup> USVI states that there is no indication that the omnidirectional antenna operating at 35 watts caused objectionable interference at any of the locations where Boatphone's representative requested that test measurements be conducted.<sup>17</sup>

5. Specifically, USVI claims that its testing reveals that USVI's signal was stronger in a few scattered areas of Tortola but nowhere near the extent that Boatphone's signal dominates on St. John. USVI states that it also tested at the 100 watt level, but found that 35 watts enabled it "to provide sufficient signal strength on St. John and the surrounding waters to overcome some of Boatphone's significant incursions in [USVI's service area.]"<sup>18</sup> Based upon these results, USVI asks the Commission to expedite the grant for the 35 watt facility at Mamey Peak as set forth in its 1992 application.<sup>19</sup>

6. Boatphone responded to USVI's April 26 letter on May 6, 1996,<sup>20</sup> stating that it "disputes or objects to virtually every meaningful factual allegation presented therein."<sup>21</sup> Boatphone criticizes USVI's testing methods and the data obtained as a result of those tests, and challenges USVI's assertion that the grant of its application would serve the public interest. Boatphone further alleges that USVI has failed to support its propagation analysis with competent testimony.<sup>22</sup> It further claims that USVI's April 26 letter was not a report but an additional request for relief,<sup>23</sup> and that it has requested the Minister of Communications of the British Virgin

---

<sup>14</sup> See Letter from Jay L. Birnbaum to William F. Caton, April 26, 1996 ("April 26, 1996 Letter").

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> See Letter from Thomas Gutierrez to William F. Caton, May 6, 1996. ("May 6, 1996 Letter").

<sup>21</sup> *Id.* at 1.

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *Id.* at 3.

Islands to provide input to the Commission.<sup>24</sup>

### III. Discussion

7. Section 309(d) of the Communications Act of 1934, as amended,<sup>25</sup> and as implemented by Section 22.130 of the Commission's rules,<sup>26</sup> provides that "Petitions to deny any major filing may be filed by parties able to demonstrate standing to file such petitions."<sup>27</sup> Section 22.130(a)(3) requires that the petitioner: (i) be a party in interest and (ii) show that the grant of the application would be prima facie inconsistent with the public interest.<sup>28</sup> The Commission has held that in determining whether a petitioner qualifies as a "party in interest," it should apply judicial standing principles.<sup>29</sup>

8. There is a two part test for determining standing.<sup>30</sup> First, the petitioner must establish that it has suffered a legal wrong or been adversely affected or "aggrieved by agency action" or show an "injury in fact" resulting from the challenged action.<sup>31</sup> The threatened or actual injury must be to the petitioner,<sup>32</sup> whether economic, aesthetic or otherwise,<sup>33</sup> and must be likely to be

---

<sup>24</sup> *Id.* at 4. We have not received any such input from the Minister of Communications.

<sup>25</sup> 47 U.S.C. § 309(d).

<sup>26</sup> 47 C.F.R. § 22.130(a)(3).

<sup>27</sup> *Id.* (Major filings are defined in 47 C.F.R. § 22.123).

<sup>28</sup> 47 C.F.R. § 1.30(a)(3). *BellSouth Mobility, Inc.*, 3 FCC Rcd 6902, 6903 ¶ 10 (1988); *Brian L. O'Neill*, 6 FCC Rcd 2572, 2574, ¶ 20 (1991); *Danbury Cellular Telephone Co.*, 8 FCC Rcd 7047, ¶ 2 (1993); see also 47 U.S.C. § 309(d); Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application, *Memorandum Opinion and Order*, 82 F.C.C. 2d 89, 95-96, ¶ 19 (1980) (hereinafter *NAB Petition for Rulemaking*).

<sup>29</sup> *NAB Petition for Rulemaking*, 82 F.C.C. 2d at 95 (1980).

<sup>30</sup> *Air Courier Conference of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 523 (1991) ("*Air Courier*"); *Barlow v. Collins*, 397 U.S. 159, 164 (1970); *Assoc. of Data Process Services v. Camp*, 397 U.S. 150 (1970); Application for Transfer of Control of the Telesis Corporation from the Trustees of the Central States, Southeast and Southwest Areas Pension Fund to the Equitable Life Assurance Society of the United States, *Memorandum Opinion and Order*, 68 F.C.C.2d 696, 698-699, ¶ 8 (hereinafter *Telesis Corp.*) (citing *United States v. SCRAP*, 412 U.S. 669 (1973); *NAB Petition for Rulemaking*, 82 F.C.C.2d at 95-96, ¶ 19.

<sup>31</sup> *Air Courier*, 498 U.S. at 523; *Telesis Corp.*, 68 F.C.C.2d at 699 (citing *United States v. SCRAP*, 412 U.S. at 751; *Barlow v. Collins*, 397 U.S. 159; *Allen v. Wright*, 468 U.S. 737, 751 (1984); *NAB Petition for Rulemaking*, 82 F.C.C.2d at 95-96, ¶ 19; see also Administrative Procedure Act, 5 U.S.C. § 702.

<sup>32</sup> *Worth v. Seldin*, 422 U.S. 490, 499 (1975).

<sup>33</sup> *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972); *Assoc. of Data Process Services v. Camp*, 397 U.S. at

prevented or redressed by a favorable decision.<sup>34</sup> Second, the petitioner must show that it is "within the zone of interests to be protected" or regulated.<sup>35</sup> The zone of interest test denies a right of review if the petitioner's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be reasonably assumed that Congress intended to permit the suit.<sup>36</sup>

9. In this case, we find that Boatphone has standing. USVT's requested modification, if granted, will result in an incursion into Boatphone's service area which could cause interference. Because Boatphone could be adversely affected by a grant of the modification, we find that it is "within the zone of interests to be protected" or regulated because Section 402(b)(6) permits persons who are aggrieved or adversely affected by a licensing order of the Commission to appeal the action.<sup>37</sup>

10. Having determined that Boatphone has standing to contest USVT's application, we now turn to the merits of that application. USVT's proposed application is likely to increase its Service Area Boundary ("SAB") so that it partially extends into an area served by Boatphone. Section 22.912 of the Commission's rules, in relevant part, provides that SABs may extend into adjacent cellular markets if such extensions are *de minimis*, are demonstrably unavoidable for technical reasons of sound engineering design, and do not extend into the CGSA of any other licensee's cellular system on the same channel block (unless the licensee of such other licensee's cellular system consents to the extension).<sup>38</sup> As we have previously stated, "[a] *de minimis* (SAB) extension is a relatively small overlap of the contour into a neighboring market which is necessary for engineering reasons to serve adequately the area within the contour located inside the market of the licensee who proposes the extension."<sup>39</sup> *De minimis* extensions generally do

---

154.

<sup>34</sup> *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976); *NAB Petition for Rulemaking*, 82 F.C.C.2d at 96, ¶ 19.

<sup>35</sup> *Air Courier*, 498 U.S. at 523; *Assoc. of Data Process Services*, 397 U.S. at 153; *Barlow*, 397 U.S. at 164; *United States v. SCRAP*, 412 U.S. 669 (1973); *Telesis Corp.*, 68 F.C.C.2d at 699, ¶ 8; *NAB Petition for Rulemaking*, 82 F.C.C.2d at 96, ¶ 19 n.50.

<sup>36</sup> *Clark v. Securities Industry Assn.*, 479 U.S. 388, 399 (1987).

<sup>37</sup> 47 U.S.C. § 402(b)(6); *Clark v. Securities Industry Assn.*, 479 U.S. at 396; *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

<sup>38</sup> 47 C.F.R. 22.912(a)(1995); *Great Lakes of Iowa, Inc.*, 8 FCC Rcd 5572 (1993).

<sup>39</sup> *Great lakes of Iowa, Inc.*, 8 FCC Rcd at 5573 citing Amendment of Part 22 of the Commission's Rules to provide for filing and processing of applications for unserved areas in the Cellular Service and to modify other cellular rules in CC Docket No. 90-6, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, n.23 (1991).

not become part of the licensee's CGSA, are not entitled to interference protection, and must be pulled back if objectionable interference occurs to adjacent licensees.<sup>40</sup>

11. An evaluation of whether a contour extension is *de minimis* begins with a determination of whether the proposed contour is minimal in size.<sup>41</sup> Consideration must also be given to the percentage size of the extension relative to the total size of the licensee's market, whether the extension is the by-product of a system designed to cover areas inside the licensee's market rather than a system designed to reach areas outside the market, and whether the border of the market in the vicinity of the 32 dBu contour extension is irregular in shape.<sup>42</sup> Although size is one consideration in determining whether a CGSA is *de minimis*, it is not the most important consideration. When a contour is minimal in size, the Bureau must determine whether any engineering justifications exist.<sup>43</sup> Engineering factors include the terrain and population of the area in question, the shape of the adjoining boundary, and any extenuating engineering problems.<sup>44</sup>

12. We have conducted our own examination of USVI's application and the supporting engineering data submitted by both parties and determined that USVI's plan to place an omnidirectional antenna at 35 watts on Mamey Peak is reasonable. The topography of the Virgin Islands is such that it cannot confine its signal to the eastern end of St. John within RSA Market 730. USVI's tests demonstrated that when it increased the power at its Mamey Peak facility from 8.9 to 35 watts and removed its reflector antenna, Boatphone remained the dominant cellular server along much of the major east-west highway on St. John and Coral Bay in the U.S. Virgin Islands as well as along the entire coast of Tortola in the British Virgin Islands.<sup>45</sup> The increase in power did improve USVI's signal on the island of St. John, particularly along the western coast of Coral Bay as well as in the U.S. territorial waters off the island.<sup>46</sup> Our examination of the data confirms USVI's claim that there is no evidence of objectionable interference at 35 watts in any

---

<sup>40</sup> *Western Maine Cellular, Inc.*, 7 FCC Rcd 8648 (1992).

<sup>41</sup> With regard to 39 dBu contour extensions, the Commission has already held that "[c]ase law guidelines for service area boundary *de minimis* extensions will be applied as adjusted for the [32dBu] formula. . . ." *Western Maine Cellular, Inc.*, 7 FCC Rcd at 8650 citing, 7 FCC Rcd 2449, 2456, n.35 (1992).

<sup>42</sup> *Rochester Telephone Mobile Communications*, 5 FCC Rcd 3233 (1990); *Florence Metronet, Inc.*, 5 FCC Rcd 1178 (1990).

<sup>43</sup> *Western Maine Cellular, Inc.*, 7 FCC Rcd at 8650.

<sup>44</sup> *Western Florida Cellular Telephone Corp.*, 6 FCC Rcd 2032 (1991); *Columbia Cellular Telephone Company*, 6 FCC Rcd 1408 (1991); *Houston Cellular Telephone Company*, 8 FCC Rcd 1641 (1993).

<sup>45</sup> April 26, 1996 Letter at 3.

<sup>46</sup> *Id.* at 2.

of the locations where Boatphone's representative had requested that test measurements be taken.<sup>47</sup>

13. We find that the public interest, convenience and necessity will be served by permitting USVI to provide more reliable service in its own service area including the elimination of roaming charges for USVI customers for calls placed in domestic "home" territory. This improved coverage will have minimal adverse effect on Boatphone's system or its ability to adequately serve its customers. While it is true that USVI's signal will extend into a small portion of Boatphone's service area, we note that Boatphone presently places a partial signal over USVI's entire service area. We believe that granting USVI's application will serve the public interest by allowing it to provide better service to its customers. Accordingly, we will grant USVI's application and dismiss Boatphone's petition to deny.

#### IV. Ordering Clauses

14. Accordingly, IT IS ORDERED THAT pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d), and the authority delegated under Section 0.331 of the Commission's rules, 47 C.F.R. § 0.331 and Section 22.130 of the Commission's rules, 47 C.F.R. § 22.130, that the Petition to Deny filed by CCT Boatphone Ltd on June 26, 1992, IS DISMISSED.

15. IT IS FURTHER ORDERED THAT pursuant to Section 309(a) of the Communications Act, as amended, 47 C.F.R. § 309(a), that the application of USVI Cellular Telephone Corporation filed on May 7, 1992 IS GRANTED.

#### FEDERAL COMMUNICATIONS COMMISSION

David L. Furth  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

---

<sup>47</sup> *Id.*