

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

In the Matter of
County of San Bernardino
Application for Fixed Point-to-Point Microwave
License at San Bernardino, California
File No: 0007055186
File No: 0007055189

ORDER ON RECONSIDERATION

Adopted: August 11, 2016

Released: August 12, 2016

By the: Deputy Chief, Policy and Licensing Division, Public Safety and Homeland Security Bureau
Chief, Broadband Division, Wireless Telecommunications Bureau

1. In this Order on Reconsideration, we address a petition for reconsideration filed by LT-WR, LLC (LT-WR) of the February 2, 2016 grant of the above-captioned applications filed by the County of San Bernardino, California (San Bernardino). LT-WR contests the license grants to the extent that they authorize San Bernardino to use microwave frequency pair 10,875/11,365 MHz. For the reasons set out below, we deny the petition for reconsideration and affirm the contested grant.

I. BACKGROUND

A. Procedural History

2. On June 20, 2014, San Bernardino requested and obtained a prior coordination notice (PCN) from its frequency coordinator Comsearch to add frequency pair 10,875/11,365 MHz to its existing microwave stations at Rialto East (call sign WNER235) and San Sevaine1 (call sign WPOS447). On December 16, 2014, San Bernardino received a six-month renewal of this PCN. On March 31, 2015, Comsearch submitted a major change PCN for this frequency pair, which it subsequently renewed on September 2, 2105. San Bernardino states that it did not receive any objections or interference complaints relative to its proposed use of the contested frequency pair.

3. On November 20, 2015 LT-WR, through its frequency coordinator, Consolidated Spectrum Services (Consolidated) requested a PCN for the contested frequency pair to add the pair to LT-WR's existing microwave stations at Nob Hill (WQKK874) and San Sevaine (WQOJ846). On November 24, 2015, Comsearch Frequency Protection Services (CFPS), on behalf of San Bernardino, notified Consolidated that the LT-WR PCN created frequency conflicts. On November 25, 2015,

1 Petition for Reconsideration, File Nos. 0007055186, 0007055189 (filed Feb. 8, 2016)(Petition).
2 Opposition to Petition for Reconsideration, File Nos. 0007055186, 0007055189 (filed Feb. 18, 2016)(Opposition).
3 Id. at 2.
4 Id.
5 Id.
6 Petition at 3.
7 Letter from Mr. Francis Ndjoumbe, Engineer II, Frequency Protection Services, Comsearch, to Howard Epstein, President, Consolidated Spectrum Services, LLC (Nov. 24, 2015).

Consolidated responded to CFPS's objection. It advised CFPS that LT-WR had an immediate need for the frequency pair and alleged that, because San Bernardino's PCN was a renewal PCN, LT-WR had priority.⁸

4. Consolidated made two subsequent modifications to its PCN. However, on December 8, 2015, CFPS informed Consolidated that the modifications did not cure the frequency conflict.⁹ On December 9, 2015, LT-WR filed applications with the FCC to add the contested frequency pairs to LT-WR's existing microwave stations at Nob Hill (WQKK874) and San Sevine (WQOJ846).¹⁰

5. On December 28, 2015, San Bernardino filed an amendment to its applications to add paths using the contested frequency pair. In its Petition, LT-WR contends that San Bernardino did not notify LT-WR that San Bernardino intended to file the amendments and that LT-WR first learned of the filings in a January 6, 2016 FCC Public Notice.¹¹ Via e-mail dated January 14, 2016, Consolidated advised CFPS that because San Bernardino was maintaining the contested frequency pair on a renewal PCN, and because LT-WR had an immediate and urgent need for the contested frequency pair, LT-WR had licensing priority for use of the contested frequency pair.¹² LT-WR also stated that Consolidated had searched for an alternative channel pair and had identified one that might be workable for San Bernardino, although not for LT-WR.¹³

6. On January 15, 2016, Comsearch, on behalf of San Bernardino, filed an informal objection to LT-WR's applications with the FCC.¹⁴ On February 1, 2016, San Bernardino itself also filed an informal objection to LT-WR's applications with the FCC.¹⁵ On February 2, 2016 the Public Safety and Homeland Security Bureau (Bureau) granted San Bernardino's applications. On February 8, 2016 LT-WR filed a timely Petition for Reconsideration of the grant.¹⁶ On February 18, 2016, San Bernardino filed an Opposition to the Petition for Reconsideration.¹⁷ On March 1, 2016, LT-WR filed a Reply to Opposition to Petition for Reconsideration.¹⁸

⁸ Petition at 4 *citing* Letter from Howard Epstein, President, Consolidated Spectrum Services to Mr. Francis Ndjombe, Frequency Protection Service, Comsearch (Nov. 25, 2015).

⁹ See Opposition at 2; *see also* Letter from Mr. David L. Wiggins, Frequency Analyst, Frequency Protection Services, Comsearch, to Howard Epstein, President, Consolidated Spectrum Services, LLC (Dec. 8, 2015).

¹⁰ See FCC File Nos. 0007058024 and 0007058135.

¹¹ Petition at 4 *citing* *Public Safety and Homeland Security Bureau Site-By-Site Action*, Public Notice, PSHSB (rel. Jan. 6, 2016).

¹² E-mail from Howard Epstein, President, Consolidated Spectrum Services, LLC to David Meyer, (Jan. 14, 2016, 9:25 PM).

¹³ Petition at 5.

¹⁴ Letter from Mr. David E. Meyer, Senior Manager, Frequency Protection Services, Comsearch, to Office of the Secretary, FCC (Jan. 15, 2016).

¹⁵ Letter from Alan S. Tilles and Georgina L.O. Feigen, counsel for San Bernardino, to Marlene H. Dortch, Secretary, FCC (Feb. 1, 2016).

¹⁶ See *generally* Petition.

¹⁷ See *generally* Opposition.

¹⁸ Reply to Opposition to Petition for Reconsideration, File Nos. 0007055186, 0007055189 (filed Mar. 1, 2016)(Reply).

B. LT-WR's Petition for Reconsideration

7. LT-WR asserts that the Bureau should have given LT-WR's applications priority over San Bernardino's because LT-WR filed its applications three weeks before San Bernardino's.¹⁹ LT-WR contends that because San Bernardino's prior notice was a renewal PCN and LT-WR had an immediate need for the contested frequencies, San Bernardino's objections to LT-WR's application are irrelevant.²⁰

8. LT-WR argues that this matter is governed by *Geodesic Networks, LLC*.²¹ LT-WR asserts that *Geodesic* stands for the premise that a licensee with "unused 'growth' channels contained in repeated renewal PCNs must relinquish those channels to an applicant having immediate need and that applies for a license to put the spectrum to actual use."²² LT-WR asserts that it has an immediate need for spectrum and that "[a]fter careful study, Consolidated has determined that there are no other available channels that can be used in [LT-WR]'s system to meet this need."²³

9. LT-WR claims that San Bernardino's use of the alternative channel that LT-WR identified, coupled with another a channel pair San Bernardino still has on a renewal PCN, would provide San Bernardino with three 30 MHz channels, leaving LT-WR with two channels. LT-WR alleges that San Bernardino is warehousing double the amount of spectrum it is actually using.²⁴ LT-WR concedes that there is a "limited place for renewal PCN's" but argues that the FCC contemplated that growth channels would be held for "months, not years."²⁵

10. Finally, LT-WR accuses San Bernardino of bad faith and abuse of process, claiming: (a) that San Bernardino failed to communicate to LT-WR that it intended to object to LT-WR's application; and (b) told the Commission that "there were no unresolved interference objections" to its applications even though, at the time, LT-WR had conflicting, mutually exclusive, applications on file. LT-WR argues that San Bernardino knew its claim that there were no unresolved interference objections to its applications was false because, in San Bernardino's informal objection to LT-WR's applications, San Bernardino stated that there were "Unresolved Issues with the County...that were reported during the coordination process."²⁶

C. San Bernardino's Opposition to Petition for Reconsideration

11. San Bernardino notes that its application is part of a larger public safety/E911 project covering 92 paths throughout the county.²⁷ San Bernardino also observes that Section 101.103(d)(2)(vii) of the Commission's Rules requires that all technical problems that "come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is

¹⁹ Petition at 5.

²⁰ *Id.*

²¹ *Geodesic Networks, LLC*, Memorandum Opinion and Order and Order on Reconsideration, 29 FCC Rcd 10429 (WTB 2014) (*Geodesic*).

²² Petition at 6 citing *Geodesic* at 10433-34.

²³ Petition at 6.

²⁴ *Id.*

²⁵ *Id.* citing *Geodesic*.

²⁶ *Id.* at 7-8.

²⁷ Opposition at 2, 3.

unable or unwilling to resolve the conflict and briefly the reason therefor.”²⁸ It states that LT-WR failed to include such a statement with its application, but rather merely stated that “[LT-WR] has an immediate need for this link. We considered this matter to be resolved.”²⁹ San Bernardino argues that the quoted statement is insufficient to satisfy the FCC’s requirements. San Bernardino claims that LT-WR’s applications were completely silent on the known interference conflict and lacked any information on LT-WR’s ability, or lack thereof, to resolve the conflict.³⁰ San Bernardino argues that LT-WR’s applications contained no mention of San Bernardino’s admonition that LT-WR’s applications conflicted with San Bernardino’s request for the contested frequencies.³¹

12. San Bernardino contends that LT-WR’s reliance on *Geodesic* is misplaced. It points out that in *Geodesic*, the entity holding the PCN (Auburn) never responded to the entity filing the subsequent PCN (Geodesic) and, indeed, only filed its application after Geodesic’s application was granted.³² Here, however, San Bernardino, unlike Auburn, twice notified LT-WR that San Bernardino’s existing PCN conflicted with LT-WR’s PCN.³³

13. In support of its reading of *Geodesic*, San Bernardino cites a 2015 joint *Public Notice* from the Wireless Telecommunications Bureau and Public Safety and Homeland Security Bureau.³⁴ In that *Public Notice*, the Bureaus clarified certain aspects of *Geodesic*. San Bernardino quotes the *Public Notice* as stating that “*Geodesic* was not intended to create a burden on the party holding the growth channel to make a demonstration that it should be allowed to keep the channel.” San Bernardino also points out that the *Public Notice* recited that the “findings in *Geodesic* simply articulated that the filing of an application in and of itself is sufficient to show that the applicant requires an additional frequency, which satisfies the first prong in Section 101.103(d)(2)(xii).”³⁵

14. According to San Bernardino, Section 101.103(d)(2)(xii) establishes a two pronged test, with the second prong of the test being that “in order to demonstrate that an applicant cannot coordinate a channel that is not reserved for future use...” an applicant is required “to provide a statement from a frequency coordinator stating that it was not possible to coordinate a non-reserved channel.”³⁶

15. San Bernardino notes that Section 101.103(d)(2)(i) requires that “[a]pplicants should make every reasonable effort to avoid blocking the growth of systems as prior coordinated...in the event that technical problems are not resolved, an explanation must be submitted with the application.” In addition, San Bernardino points out that Section 101.103(d)(2)(vii) requires that all technical problems that “come to light during coordination must be resolved unless a statement is included with the

²⁸ *Id.* at 3 citing 47 CFR §101.103(d)(2)(vii).

²⁹ Opposition at 3 citing Letter from Howard Epstein, President, Consolidated Spectrum Services to Mr. Francis Ndjoumbe, Frequency Protection Service, Comsearch (Nov. 25, 2015).

³⁰ Opposition at 3-4.

³¹ *Id.* at 4.

³² Opposition at 4-5.

³³ *Id.* at 5.

³⁴ *Wireless Telecommunications Bureau’s Broadband Division and Public Safety and Homeland Security Bureau’s Policy and Licensing Division Issue Declaratory Ruling on Microwave Frequency Coordination and Seek Comment on Portion of Petition for Declaratory Ruling Filed by the Fixed Wireless Communications Coalition, Inc.*, Public Notice, 30 FCC Rcd 355 (WTB PSHSB 2015)(Microwave Coordination PN).

³⁵ Opposition at 6-7 citing Microwave Coordination PN, 30 FCC Rcd at 361.

³⁶ Opposition at 7 citing 47 CFR §101.013(d)(2)(xii).

application to the effect that the applicant is unable or unwilling to resolve the conflict and briefly the reason therefor.³⁷ San Bernardino contends that LT-WR failed to comply with either of these requirements.³⁸ San Bernardino also questions whether LT-WR has an “immediate need” for the spectrum given that it is not using spectrally efficient equipment.³⁹

16. San Bernardino states that it is not warehousing spectrum, but rather is licensing the contested channels as part of an ongoing \$162 million upgrade to its Public Safety/E911 system.⁴⁰ It also rejects LT-WR’s accusations of misrepresentation and lack of candor as unfounded.⁴¹

D. LT-WR’s Reply to Opposition to Petition for Reconsideration

17. On March 1, 2016, LT-WR filed its Reply to the San Bernardino Opposition.⁴² LT-WR states that, at the time it submitted its applications, it believed there was no outstanding frequency conflict with San Bernardino.⁴³ LT-WR argues that *Geodesic* controls because “the procedure and sequence here is exactly the same as that addressed in [*Geodesic*].⁴⁴ LT-WR argues that San Bernardino’s interpretation of *Geodesic* would render the case meaningless and unenforceable because a spectrum hoarder could always defeat a challenge by simply filing an application.⁴⁵

18. LT-WR states that San Bernardino never questioned or disputed LT-WR’s claim of need or its assertion that the contested channels were the only the only unused channels available to meet that need.⁴⁶ LT-WR reiterates that it identified alternative channels for San Bernardino but that San Bernardino never explained why it could not use the alternative channels recommended by LT-WR.⁴⁷

II. DISCUSSION

19. In its Petition, LT-WR contends that the Bureau granted the San Bernardino applications because it misapplied *Geodesic*. We disagree. In *Geodesic*, the Bureau found that the licensee that was seeking relinquishment of another licensee’s growth channels had substantially complied with the required frequency coordination procedures.⁴⁸ Not so here.

20. We find that, prior to filing its application for a major modification of the facilities associated with call sign WQOJ846, LT-WR failed to properly coordinate the application with San Bernardino in recognition of San Bernardino’s PCN for growth channels on the contested frequencies. This failure to coordinate prior to filing violated Section 101.103(d)(1) of the Commission’s Rules, which

³⁷ *Id.* citing 47 CFR §§ 101.013(d)(2)(viii).

³⁸ Opposition at 7.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 8-9.

⁴¹ *Id.* at 9-10.

⁴² See generally Reply.

⁴³ Reply at 1.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.*

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 3-4.

⁴⁸ *Geodesic*, 29 FCC Rcd at 10433, para.13.

provides that: “Proposed frequency usage must be prior coordinated with existing licensees, permittees and applicants in the area, and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference on active channels, applied-for channels, *or channels coordinated for future growth*. Coordination must be completed *prior to filing an application for regular authorization, or a major amendment to a pending application, or any major modification to a license.*”⁴⁹

21. The record is clear that, upon receipt of LT-WR’s PCN for the contested channels, San Bernardino notified LT-WR that LT-WR’s proposed use of the channel pairs was incompatible with San Bernardino’s need to retain those channels for future growth. In response, LT-WR only stated that LT-WR had an immediate need for the contested channels and that, because the County’s PCN was a renewal PCN, LT-WR had priority over San Bernardino. LT-WR therefore stated that it considered the matter closed.

22. LT-WR’s claim to priority was incorrect. Section 101.103(d)(2)(xii) provides: “Any frequency reserved by a licensee for future use in the bands subject to this part must be released for use by another licensee, permittee or applicant upon a showing by the latter that it requires an additional frequency and cannot coordinate one that is not reserved for future use.”⁵⁰ Therefore, to require San Bernardino to release the contested channel pair for LT-WR’s immediate use, LT-WR needed to make two separate showings with its applications: 1) that it required an additional channel pair and 2) that it could not coordinate a pair that was not reserved for future use.

23. When LT-WR filed its PCN for the contested frequency pair it failed – as the rules require – to provide any information about whether it could coordinate a separate channel that was not reserved for future use. Instead, it merely claimed that it had a superior need for the channel pair. LT-WR’s subsequently informing San Bernardino that a channel pair perhaps existed that San Bernardino could use does not satisfy the provisions of Section 101.103(d)(2)(xii) of the rules.

24. Since LT-WR did not comply with either provision of Section 101.103(d)(2)(xii), it could not require San Bernardino to relinquish its growth channels merely by filing an application.⁵¹ Therefore, San Bernardino’s and LT-WR’s applications remained mutually exclusive, and Section 101.103(d)(2)(vii) required the parties to resolve all technical problems that came to light during coordination.⁵² Failing that, LT-WR needed to include a statement with its application to the effect that it was unable or unwilling to resolve the conflict and briefly the reason therefor.⁵³ It did not do so.

III. DECISION

25. Because LT-WR did not satisfy the provisions of Section 101.103(d)(2)(vii) at the time it filed its application, its application was unacceptable *ab initio* because it was not properly coordinated at the time it was filed. Therefore the Bureau did not err when it granted San Bernardino’s later filed, properly coordinated, application for the channel pair.

⁴⁹ 47 CFR § 101.013(d)(1)(emphasis added).

⁵⁰ 47 CFR § 101.013(d)(2)(xii).

⁵¹ We note that, because we find that LT-WR failed to show that it could not coordinate a channel that was not reserved for future use, we need not address whether the mere assertion of need is a sufficient showing for the purposes of the rule.

⁵² 47 CFR § 101.013(d)(2)(vii).

⁵³ *Id.*

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that pursuant to Sections 4(i), 309, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and 405, and Sections 1.106 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.939, the Petition for Reconsideration filed by LT-WR, LLC on February 6, 2014 IS DENIED.

27. 22. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.41 and 1.939 of the Commission's rules, 47 C.F.R. §§ 1.41, 1.939, that the Informal Objection filed by the County of San Bernardino, California on February 1, 2016 IS GRANTED.

28. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.934 of the Commission's Rules, 47 C.F.R. § 1.946, that the licensing staff of the Wireless Telecommunications Bureau SHALL DISMISS the applications filed by LT-WR, LLC on December 9 and December 10, 2015 (File Nos. 0007058024 & 0007058135).

29. These actions are taken pursuant to the authority delegated by Sections 0.131, 0.191, 0.331 and 0.392 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.191, 0.331, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief, Policy and Licensing Division
Public Safety and Homeland Security Bureau

Blaise A. Scinto
Chief, Broadband Division
Wireless Telecommunications Bureau