DOCKET FILE COPY ORIGINAL

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

In the Matter of	)	
	)	
Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40.0 GHz Bands	)	ET Docket No. 95-183 RM-8553
	)	
Implementation of Section 309(j) of The Communications Act – Competitive Bidding, 37.0 – 38.6 GHz and 38.6 – 40.0 GHz Bands	)	PP Docket No. 93-253

MAY 26 11 47 AM '00
FCC MAIL SECTION

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 2000 **Released:** May 25, 2000

By the Commission:

1. The Commission has before it a motion to accept a late-filed submission (Motion)[1] and an underlying application for review,[2] filed on December 27, 1999, by Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation and Wireless Telco (collectively, Movants), seeking review of a November 23, 1999 *Denial Order*[3] denying Movants' Joint Motion for Stay (Stay Motion) of the effectiveness of recent Public Safety and Private Wireless Division (Division) dismissal actions and orders implementing the Commission's processing policy established in 1997[4] and affirmed in 1999,[5] concerning certain 38.6-40.0 GHz (39 GHz) Microwave Radio Service applications and related submissions, pending review by the United States Court of Appeals for the District of Columbia. As discussed below, we deny the Motion and the underlying late-filed application for review.

---

[1] Motion to Accept Late-File Submission (filed Dec. 27, 1999)(*Motion*).

[2] Application for Review (filed Dec. 27, 1999).

[3] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Order*, 14 FCC Rcd 19668 (WTB 1999)(*Denial Order*).

[4] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd. 18600 (1997) (*Report and Order and Second NPRM*); *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands ET Docket No. 95-183, RM-8553; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands ET Docket No. 95-183, RM-8553, *Memorandum Opinion and Order*, 14 FCC Rcd. 12428 (1999) (*July 29 MO&O*).

[5] *July 29 MO&O,* 14 FCC Rcd. 12428.

2. In its motion, Movants allege that the application for review was tendered to a courier at 4:30 p.m. on December 23, 1999, allowing "more than ample time for a normal delivery to the Commission's Office of the Secretary by the 7 p.m. filing deadline."[6] Movants explain that the courier's vehicle experienced a mechanical breakdown and that the courier was "unable to reach his dispatcher via his company-supplied two-way radio, or any other means" to report the problem or to arrange for an alternate delivery scheme to meet the 7 p.m. filing deadline.[7] As a result, the application for review was filed on December 27, 1999, the first business day following the failed delivery attempt.[8]

3. We find that Movants' application for review was late filed and must be dismissed. Section 5(4) of the Communications Act, as amended, permits any person aggrieved by any action of a delegated authority to file an application for review within the time and in such manner as the Commission may prescribe.[9] Our rules require that applications for review of decisions issued by a delegated authority must be filed within thirty days from the date of public notice of such decision.[10] Movants' assertion that the vehicle of its courier service experienced a mechanical breakdown does not constitute a sufficient justification for the late filing of the application for review. In reaching this decision we find that enforcement of our procedural rules, including periods for filing applications for review, is necessary in order to manage our decision making process in an efficient manner. We are guided by court decisions affirming that enforcement of our procedural rules promotes orderliness and finality in the administrative process and thereby contributes towards the public interest, convenience, and necessity.[11] Accordingly, we deny Movants' motion for leave to file the application for review.

4. Since the 30-day filing period for applications for review is not mandated by the Communications Act, the Commission has the discretion to examine a late-filed application for review if the public interest requires consideration of the issues raised. In its application for review, Movants argue that the Wireless Telecommunications Bureau's (Bureau's) analysis of its stay request "resulted in an inadequate review," and assert that if "the correct four factor 'sliding scale' test had been applied, the requested relief would have issued, based on the totality of the circumstances."[12] We find that Movants' argument lacks merit. In determining whether to grant the extraordinary remedy of a stay, the Commission considers the following factors: (1) the likelihood of success on the merits by the party requesting the stay; (2) whether irreparable harm would occur in the absence of a stay; (3) whether other interested parties

---

[6] Motion at 1-2.

[7] *Id.* at 2.

[8] *Id.*

[9] 47 U.S.C. § 155(4).

[10] Communique Telecommunications, Inc. d/b/a Logicall Application for Review of the Declaratory Ruling and Order Issued by the Common Carrier Bureau, *Memorandum Opinion and Order*, 14 FCC Rcd. 13,635 ¶ 16 *citing* 47 C.F.R. §§ 1.115(d), 1.4(b)(2); *See* 47 U.S.C. § 155(c)(4).

[11] *WSTE-TV, Inc. v. FCC*, 566 F.2d 333, 337 (D.C. Cir. 1977); *Civic Telecasting Corporation v. FCC*, 523 F.2d 1185, 1188 (D.C. Cir. 1975), cert. denied, 426 U.S. 949 (1976); *Spanish International Broadcasting Co. v. FCC*, 385 F.2d 615, 622 (D.C. Cir. 1967); *Valley Telecasting Co. v. FCC*, 336 F.2d 914, 917 (D.C. Cir. 1964).

[12] Application for Review at 4-5. Movants assert that a sliding-scale analysis of four factors is often utilized when evaluating the merits of a stay request: (1) public interest, (2) substantial harm to non-moving parties, (3) irreparable harm to movants, and (4) whether movants are likely to prevail on the merits.

would suffer substantial harm if the stay was granted; and (4) whether the public interest weighs in favor of a stay.[13] In the instant setting, where the analysis of the irreparable harm factor definitively disposes of a stay motion, the Bureau need only consider whether the applicants have demonstrated that in the absence of a stay, they will suffer irreparable harm.[14]

5. Movants' sole claim of injury is that they will suffer irreparable harm if current and continuing Division-level individual licensing actions and dismissal orders concerning pending 39 GHz applications are allowed to continue and Movants subsequently prevail on the merits in the case pending before the D.C. Circuit addressing those applications.[15] We affirm the Branch's finding "that such vague assertion is insufficient to justify injunctive relief as it fails to demonstrate an injury that is 'certain and great . . . not theoretical.'"[16]

6. We are not persuaded that the Movants alleged injuries -- such as delays[17] and litigation costs[18] -- are sufficient to warrant a stay. In this connection, we note that economic loss "does not, in and of itself, constitute irreparable harm."[19] We affirm the Bureau's finding that Movants' Motion is void of any specific discussion concerning the absence of adequate compensatory relief.[20] Moreover, if Movants wholly prevail in their judicial appeal of the Commission's decision, the Movants then would be put in the position they would have been in had the Division-level orders not been released.[21]

---

[13] *See Virginia Petroleum Jobbers Ass'n v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Petroleum*), *as modified in Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977). *See also Cincinnati Bell Telephone Company,* 8 FCC Rcd. 6709 (1993).

[14] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*).

[15] Motion at 9. *See Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidates Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999) (Appeals case).

[16] *Denial Order* at 2, *citing* Wisconsin Gas Co. v. FERC, 758 F.2d at 674.

[17] Motion at 2.

[18] *Id.* at 7.

[19] *Wisconsin Gas*, 758 F.2d at 674. *See also Virginia Petroleum*, 259 F.2d at 925 ("mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

[20] *See Reynolds Metals Co. v. F.E.R.C., 777 F.2d 760, 762 (D.C. Cir., Nov 26, 1985); Virginia Petroleum*, 259 F.2d at 925; *Storer Communications* 101 FCC 2d at 451.

[21] *See* 47 U.S.C. § 402(h).

7. We affirm the Bureau's finding that Movants wholly failed to show that they would suffer irreparable injury in the absence of injunctive relief,[22] and find that the public interest does not require that the issues raised in the late-filed application for review be further addressed.[23]

8. Accordingly, IT IS ORDERED pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the Motion to Accept Late-Filed Submission, filed by Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation and Wireless Telco on December 27, 1999, IS DENIED.

9. IT IS FURTHER ORDERED pursuant to Sections 4(i) and 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(4), and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review, filed by Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation and Wireless Telco on December 27, 1999, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[22] *Denial Order* at 2.

[23] *Report and Order and Second NPRM*, 12 FCC Rcd. at 18600; *aff'd* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands ET Docket No. 95-183, RM-8553, *July 29 MO&O*, 14 FCC Rcd. 12428.