

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

In the Matter of the Application of	)	
	)	
PAUL R. LIKINS	)	FCC File Nos. 9600002 and 9600014
	)	
Requests for Reinstatement <i>Nunc Pro Tunc</i> and/or	)	
Stay of Processing Action	)	

**ORDER**

**Adopted: March 28, 2000**

**Released: March 30, 2000**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* This Order addresses two separate but substantively similar requests<sup>1</sup> (collectively, Requests) filed by Paul R. Likins (Likins) to reinstate *nunc pro tunc* or, in the alternative, stay the dismissal of the above-captioned applications for authorization to operate point-to-point microwave stations in the 39850-39900 MHz band in the Lorain, Ohio,<sup>2</sup> and Santa Rosa, California<sup>3</sup> areas. For the reasons set forth below, we deny the requests.

2. *Background.* On January 29, 1992, an application filed by Bay Area Teleport, Inc. (Bay Area) seeking authorization to operate a point-to-point microwave station on the 39850-39900 MHz band in the Santa Rosa, California area was placed on public notice.<sup>4</sup> On July 26, 1995, an application filed by AT&T Wireless PCS, Inc. (AT&T), seeking authorization to operate a point-to-point microwave station on the 39850-39900 MHz band in the Lorain, Ohio area was placed on public notice.<sup>5</sup> On October 2, 1995, Likins filed two applications seeking authorization to operate facilities in the same band in the same areas.

3. On December 15, 1995, the Commission suspended the processing of pending mutually exclusive applications in the 38.6-40.0 GHz (39 GHz) band and the filing of amendments thereto,

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<sup>1</sup>Letter from Walter H. Sonnenfeldt, counsel for Paul R. Likins, to Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (filed Oct. 1, 1999) (Lorain Request); Letter from Walter H. Sonnenfeldt, counsel for Paul R. Likins, to Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (filed Oct. 27, 1999) (Santa Rosa Request).

<sup>2</sup>FCC File No. 9600002. *Public Notice*, Report No. 1157 (rel. Oct. 18, 1995) (Lorain Application).

<sup>3</sup>FCC File No. 9600014. *Public Notice*, Report No. 1157 (rel. Oct. 18, 1995) (Santa Rosa Application).

<sup>4</sup>FCC File No. 9210613. *Public Notice*, Report No. D-628, Common Carrier Bureau Domestic Facilities Applications (rel. Jan. 29, 1992).

<sup>5</sup>FCC File No. 9507184. *Public Notice*, Report No. 1145 (rel. Jul. 26, 1995).

pending the outcome of a rulemaking proceeding affecting this service.<sup>6</sup> In a *Report and Order and Second NPRM*, released on November 3, 1997, the Commission stated that it would 1) “dismiss without prejudice all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995,” and 2) “dismiss without prejudice all applications that had not been placed on public notice or completed the 60-day cut-off period as of November 13, 1995.”<sup>7</sup> On July 29, 1999, the Commission affirmed its license processing rules in a *Memorandum Opinion and Order* and reiterated that it would “dismiss all amendments, filed on or after December 15, 1995, including those intended to resolve mutual exclusivity among pending 39 GHz applications.”<sup>8</sup> The Commission further decided to dismiss as unripe “those applications for which the 30-day public notice period was not completed by the November 13, 1995 *Freeze Order*” date.<sup>9</sup>

4. By letters dated August 27, 1999,<sup>10</sup> and September 27, 1999,<sup>11</sup> respectively, the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed Likins’s Lorain and Santa Rosa applications, pursuant to Section 1.934(f) of the Commission’s Rules.<sup>12</sup> The Branch found that Likins’s applications conflicted with the previously-filed AT&T and Bay Area applications, and that, because Likins’s applications were filed more than sixty days after the first-filed applications, Likins’s applications were untimely pursuant to Section 101.45 of the Commission’s Rules.<sup>13</sup> On October 1, 1999,<sup>14</sup> and October 27, 1999,<sup>15</sup> Likins filed letters requesting a stay of the dismissals or, alternatively, reinstatement *nunc pro tunc* of his applications.

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<sup>6</sup>Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, ET Docket No. 95-183, 11 FCC Rcd 4930, 4988-4989 ¶ 123 (1995) (*NPRM and Order*).

<sup>7</sup>See Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600, 18605 ¶ 3 (1997) (*Report and Order and Second NPRM*).

<sup>8</sup>Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12440-12448 ¶ 37 (1999) (*July 29 MO&O*).

<sup>9</sup>*Id.* at 12450-12452 ¶ 44.

<sup>10</sup>Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Paul R. Likins (August 27, 1999).

<sup>11</sup>Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Paul R. Likins (Sep. 27, 1999).

<sup>12</sup>47 C.F.R. § 1.934(f) (providing for dismissal of early- or late-filed applications).

<sup>13</sup>47 C.F.R. § 101.45(b) providing that no application will be entitled to comparative consideration with a previously filed application unless such application is substantially complete and tendered for filing within sixty days after the date of the public notice listing the first of the conflicting applications as accepted for filing).

<sup>14</sup>Lorain Request.

<sup>15</sup>Santa Rosa Request.

5. *Discussion.* Likins notes in both requests that he has filed an appeal seeking judicial review of the Commission's 39 GHz orders.<sup>16</sup> He states that one of the issues in the appeal is the Commission's "treatment of partial mutual exclusivity between applicants."<sup>17</sup> Likins argues that, given the pendency of an appeal raising issues determinative to the resolution of his application, the application should be reinstated or, in the alternative, the dismissal should be stayed.<sup>18</sup> Likins contends that granting the requested relief would serve the public interest, convenience and necessity by "eliminating the need for additional duplicative litigation" and helping to "remove uncertainties as to the availability of the subject frequency assignments with respect to the contemplated competitive bidding process."<sup>19</sup>

6. To receive a stay of an administrative action, a party must show that: 1) it will suffer irreparable harm if the stay is not granted, 2) it is likely to prevail on the merits of its appeal, 3) the grant of a stay will not harm other interested parties, and 4) the grant would serve the public interest.<sup>20</sup> As the Wireless Telecommunications Bureau (Bureau) explained in a recent *Order* denying a motion for stay of dismissals in the 39 GHz band, a vague assertion of irreparable harm is insufficient to justify injunctive relief, as it fails to demonstrate an injury that is "certain and great. . . not theoretical."<sup>21</sup> We are not persuaded that the types of injuries Likins mentions are sufficient to warrant a stay. Anticipated economic loss "does not, in and of itself, constitute irreparable harm."<sup>22</sup> Likewise, Likins has not demonstrated that the purported harm is irreparable. In this connection, we note that if he were to prevail in his judicial appeal of the Commission's order regarding the dismissal of the subject applications, we anticipate that such relief would address the ultimate disposition of the applications.<sup>23</sup> Therefore, we find that Likins has not shown any injury warranting a stay.<sup>24</sup>

7. In addition, we find Likins's alternate request that we reinstate his applications until his judicial appeal is resolved effectively to be a restatement of his request for a stay, so we deny those requests, as well. Moreover, reinstating Likins's applications would frustrate the goals underlying this proceeding and "could lead to results inconsistent with our intent . . . to update the regulatory structure of

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<sup>16</sup>See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999).

<sup>17</sup>Santa Rosa Request at 2; Lorain Request at 2.

<sup>18</sup>Santa Rosa Request at 2; Lorain Request at 2.

<sup>19</sup>Santa Rosa Request at 3; Lorain Request at 2.

<sup>20</sup>See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) (*Virginia Petroleum*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

<sup>21</sup>Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands, *Order*, ET Docket No. 95-183, RM-8553, DA 99-2632, ¶ 2 (WTB rel. Nov. 23, 1999) (citation omitted).

<sup>22</sup>*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wisconsin Gas*); 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").

<sup>23</sup>See 47 U.S.C. § 402(h).

<sup>24</sup>Where, as here, petitioner fails to show that it will suffer irreparable harm in the absence of injunctive relief, we need not consider the other requirements for a stay. *Wisconsin Gas*, 758 F.2d at 674.

the 39 GHz band in light of contemporary market conditions.”<sup>25</sup> Further, we believe that the Bureau addressed this matter in its November 23, 1999, decision.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission’s Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action of Application FCC File No. 9600002 filed on October 1, 1999, by Paul R. Likins IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to Sections 154(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.41 and 1.106 of the Commission’s Rules, 47 C.F.R. §§ 1.41, 1.106, the Request for Reinstatement *Nunc Pro Tunc* and/or Stay of Processing Action of Application FCC File No. 9600014 filed on October 27, 1999, by Paul R. Likins IS DENIED.

10. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission’s Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D’wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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<sup>25</sup>July 29 MO&O, 14 FCC Rcd at 12437-38; Report and Order and Second NPRM, 12 FCC Rcd at 2917 ¶ 15; NPRM and Order, 11 FCC Rcd at 4988-89 ¶¶ 121-124.