

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

In the Matter of the Application of)	
)	
LINDA CHESTER)	FCC File No. 9510564
)	
Request 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 a request filed by Linda Chester (Chester) on September 30, 1999¹ to reinstate *nunc pro tunc* the above-captioned application or, in the alternative, stay the dismissal of the application.² For the reasons set forth below, we deny the request.

2. *Background.* On September 29, 1995, Chester filed an application for authorization to operate a point-to-point microwave station in the Oxnard, California area on the 38.6-40.0 GHz (39 GHz) band, which was placed on public notice on October 18, 1995.³ One portion of Chester's application sought authorization to operate facilities in the 39850-39900 MHz band, which overlapped with an application previously filed on August 9, 1995 by GHz Equipment Company, Inc. (GEC) to provide service on these frequencies in the Santa Barbara, California area.⁴ The other portion of Chester's application sought authorization for facilities in the 39150-39200 MHz band.⁵

3. On December 15, 1995, the Commission suspended the processing of pending mutually exclusive 39 GHz applications and the filing of amendments thereto, pending the outcome of a rulemaking proceeding affecting this service.⁶ 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

¹Letter from Walter H. Sonnenfeldt, counsel for Linda Chester, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (filed Sept. 30, 1999) (Request).

²Letter from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Linda Chester (Aug. 27, 1999) (Dismissal Letter).

³FCC File No. 9510564. *Public Notice*, Report No. 1157 (rel. Oct. 18, 1995) (Application).

⁴FCC File No. 9508263. *Public Notice*, Report No. 1147 (rel. Aug. 9, 1995).

⁵Application.

⁶Amendment 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*).

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.”⁷ 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.”⁸ 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.⁹

4. On February 26, 1997, GEC’s request to withdraw its application was granted.¹⁰ On August 27, 1999, the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch dismissed Chester’s application because part of the application had been mutually exclusive as of December 15, 1995, and the remaining part had not satisfied the 30-day public notice requirement as of November 13, 1995.¹¹

5. *Discussion.* Chester notes that she has filed an appeal seeking judicial review of the Commission’s 39 GHz orders.¹² She states that one of the issues in that case is the Commission’s treatment of voluntary amendments or dismissals that were submitted to the Commission after December 15, 1995, *i.e.*, whether an event like the withdrawal of GEC’s application should be deemed to resolve any mutual exclusivity.¹³ She states that her appeal also challenges the “legal relevance and applicability of November 13, 1995 as a deadline for completion of the 30-day statutory protest period.”¹⁴ Chester argues that, given the pendency of an appeal raising issues determinative to the resolution of her application, the application should be reinstated or, in the alternative, the dismissal should be stayed. She 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.”¹⁵

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

⁷See 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 (1997) (*Report and Order and Second NPRM*).

⁸Amendment 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*).

⁹*Id.* at 12450-12452 ¶ 44.

¹⁰*Public Notice*, Report No. 1927 (rel. Mar. 4, 1997).

¹¹Dismissal Letter at 1.

¹²See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362) (D.C. Cir. 1999).

¹³Request at 2.

¹⁴*Id.*

¹⁵*Id.*

of a stay will not harm other interested parties, and 4) the grant would serve the public interest.¹⁶ As the Wireless Telecommunications Bureau explained in a recent *Order* denying a motion for stay of 39 GHz dismissals, 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.”¹⁷ We are not persuaded that the types of injuries Chester mentions are sufficient to warrant a stay. Anticipated economic loss “does not, in and of itself, constitute irreparable harm.”¹⁸ Likewise, Chester has not demonstrated that the purported harm is irreparable. In this connection, we note that if she were to prevail in her judicial appeal of the Commission’s order regarding the dismissal of the subject application, we anticipate that such relief would address the ultimate disposition of the application.¹⁹ Therefore, we find that Chester has not shown any injury warranting a stay.²⁰

7. In addition, we find Chester’s alternate request that we reinstate her application until her judicial appeal is resolved effectively to be a restatement of her request for a stay, so we deny that request, as well. Moreover, reinstating Chester’s application would frustrate the goals underlying this proceeding and “could lead to results inconsistent with our intent . . . to update the regulatory structure of the 39 GHz band in light of contemporary market conditions.”²¹ 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 filed September 30, 1999, by Linda Chester IS DENIED.

9. This action is 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

¹⁶See *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).

¹⁷Amendment 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).

¹⁸*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”).

¹⁹See 47 U.S.C. § 402(h).

²⁰Where, 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.

²¹*July 29 MO&O*, 14 FCC Rcd at 12437-38; *Report and Order and Second NPRM*, 12 FCC Rcd at 2917 ¶ 15; *Report and Order and Second NPRM*, 11 FCC Rcd at 4988-89 ¶¶ 121-124.