

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

In re Application of	)	
	)	
ROBERT FETTERMAN D/B/A	)	File No. 26735-CD-P/L-01-93
RF COMMUNICATIONS	)	
	)	
For Authority to Operate a New	)	
Domestic Public Land Mobile Radio	)	
Service Station on the Frequency	)	
454.125 MHz at St. Clair, Pennsylvania	)	

**ORDER**

**Adopted: May 4, 2001**

**Released: May 7, 2001**

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

**I. Introduction**

1. This order addresses the Petition for Reconsideration filed by Robert Fetterman d/b/a RF Communications (RF) on January 19, 2000.<sup>1</sup> RF seeks reconsideration of a December 20, 1999 order of the Wireless Telecommunications Bureau, Commercial Wireless Division (Division), which granted the Petition to Dismiss or Deny filed by Richard Blyler d/b/a Lebanon Mobilfone (Lebanon) on August 20, 1993, denied the above-captioned application, and denied the Motion to Set Aside filed by RF on September 9, 1993.<sup>2</sup>

**II. Background**

2. In July 1993, RF applied to operate a Domestic Public Land Mobile Radio Service station on 454.125 MHz at St. Clair, Pennsylvania.<sup>3</sup> On August 20, 1993, Lebanon filed a Petition to Dismiss or Deny Fetterman's application (Petition to Dismiss), stating that its station (KSV940) was already authorized for the frequency 454.125 MHz at Lebanon, Pennsylvania, and that operation of the proposed

<sup>1</sup> RF Petition for Reconsideration, filed January 19, 2000 (Petition for Reconsideration).

<sup>2</sup> Robert Fetterman, *Order*, DA 99-2839 (Wir. Tel. Bur., Comm. Wireless Div., rel. Dec. 20, 1999) (*Order*).

<sup>3</sup> See *Public Notice*, Report No. PMS-93-42 (Com. Car. Bur., rel. July 21, 1993).

RF facilities at St. Clair would cause harmful electrical interference to its co-channel facilities at Lebanon.<sup>4</sup> In addition, on September 9, 1993, RF filed a Motion to Set Aside Lebanon's authorization for the 454.125 MHz frequency facilities at Lebanon, and an Opposition to the Petition to Dismiss or Deny filed by Lebanon.

3. In its Motion to Set Aside, RF argued that Lebanon did not have a valid authorization for frequency 454.125 MHz because that frequency was not included on the construction permit issued to Lebanon in 1979.<sup>5</sup> RF also argued that it relied on the Commission's licensing database to determine the existence of possible co-channel licenses and the database did not indicate any facilities licensed to Lebanon on 454.125 MHz at this location.<sup>6</sup> In its *Order*, the Division noted that, although Lebanon's 1979 construction permit did not list 454.125 MHz, the June 11, 1979 Public Notice of grant of the application did list the frequency,<sup>7</sup> which the Division found to provide proof that the frequency had been granted to Lebanon.<sup>8</sup> The Division further found that the omission of the frequency from Lebanon's original construction permit was a clerical error that had been subsequently corrected.<sup>9</sup>

4. In its Petition for Reconsideration, RF presents four arguments: (1) that the Division erred when it found that the June 1979 *Public Notice* was proof that the Commission authorized Lebanon to use 454.125 MHz; (2) that the June 1979 *Public Notice* did not provide sufficient notice to later applicants; (3) that Lebanon did not seek to correct the omission of 454.125 MHz from its authorization on a timely basis, and is therefore estopped from claiming authority to operate on the frequency; and (4) that Lebanon had a duty to inform the Commission of any error on the instrument of authorization.<sup>10</sup> RF also contends generally that the Division did not address the legal arguments raised in RF's Motion to Set Aside.<sup>11</sup>

### III. Discussion

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<sup>4</sup> Petition to Dismiss at 2.

<sup>5</sup> Motion to Set Aside at 3.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Public Notice*, No. 966-A (Com. Car. Bur., rel. June 11, 1979) (June 1979 *Public Notice*). The Public Notice stated, in the section identified as "ACTIONS TAKEN" in the Domestic Public Land Mobile Radio Service, the following: "Richard F. Blyler: d/b/a Lebanon Mobilefone (KSV-940) GRANTED C.P. for additional facilities to operate on 454.300 & 454.125 MHz at Loc. #2: Sand Hill Road, 2.75 miles North of Lebanon, PA (20523-CD-P-79)(2-way)."

<sup>8</sup> *Order* at 2.

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

<sup>10</sup> Petition for Reconsideration at 1-2.

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

5. We have analyzed the Petition for Reconsideration and conclude that the *Order* was correctly decided. First, we reject the argument that the June 1979 *Public Notice* does not constitute evidence that Lebanon was authorized to operate on frequency 454.125 MHz. A Public Notice is not a construction permit; rather, it provides evidence of the Commission's grant of an authorization and provides notice of such a grant to the public. The June 1979 *Public Notice* specifically indicated that Lebanon's application requesting authority to operate on 454.125 MHz was granted.<sup>12</sup> Although the construction permit inadvertently failed to list the frequency, this omission was a clerical error that was subsequently corrected. Administrative agencies have the authority to correct inadvertent, ministerial errors, and we conclude that such authority was properly exercised in this matter.<sup>13</sup>

6. RF argues that the June 1979 *Public Notice* did not provide sufficient notice to later applicants of Lebanon's right to operate on 454.125 MHz, and that RF relied to its detriment on the Commission's database in determining whether its proposed operation would cause interference.<sup>14</sup> We do not find this argument persuasive. Applicants have been cautioned that Commission databases and lists are unofficial records that should not be relied on because of possible inconsistencies between such databases and the primary sources of information, including public notices.<sup>15</sup>

7. Moreover, even if we accepted RF's argument that it did not receive sufficient notice, RF has failed to show detrimental harm. At the time of the filing of RF's application, it could not have been processed because it would have conflicted with Lebanon's earlier-filed application. The clerical error in failing to include 454.125 MHz on Lebanon's authorization does not operate as either a dismissal of Lebanon's application, or as a revocation of Lebanon's license, either of which would be necessary in order to find RF's application suitable for grant. Further, RF's application for authority to operate on 454.125 MHz would not have been included in a mutually exclusive filing group with Lebanon's application, as RF's application was filed almost 15 years after the expiration of the applicable cut-off period.

8. RF further argues that, by virtue of the omission of 454.125 MHz from Lebanon's construction permit, Lebanon received only a partial grant of authority under our rules with respect to its applications, and forfeited any right to 454.125 MHz because it did not seek to have the partial grant corrected within 30 days of the issuance of the license.<sup>16</sup> Because we have concluded that the failure to list 454.125 MHz on the initial construction permit was an administrative error, we reject the claim that this was a partial grant and find that Lebanon did not forfeit its right to operate on the channel. The issuance of

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<sup>12</sup> See June 11, 1979 *Public Notice*.

<sup>13</sup> *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5<sup>th</sup> Cir.), *cert. denied*, 449 U.S. 826 (1980); see *American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145-46 (1958).

<sup>14</sup> Petition for Reconsideration at 4.

<sup>15</sup> See *Mobilfone of Northeastern Pennsylvania, Inc., Memorandum Opinion and Order*, 5 FCC Rcd 7414, 7415, ¶ 10 (Com. Car. Bur. 1990) (citing Commission rule section 0.434(e), 47 C.F.R. § 0.434(e)); *B & B Communications, Inc., Order on Reconsideration*, 1986 WL 290989, File No. 23962-CD-P/L-85, ¶ 3 (Com. Car. Bur. 1986).

<sup>16</sup> Petition for Reconsideration at 3; Opposition to Petition to Dismiss or Deny at 4-5.

a partial grant would have required the Bureau to inform the applicant of the reasons that its application was granted only in part or was otherwise subject to any terms or conditions other than those normally applied to applications of the same type.

9. RF argues that Lebanon is barred under the doctrine of laches from asserting a right to the 454.125 MHz frequency<sup>17</sup> and claims that Lebanon failed to perform its duty to inform the Commission of any error in the authorization issued by the Commission. We find no merit to these arguments. The party alleging laches has the burden of establishing that it “has been prejudiced by [another party’s] inexcusable delay in asserting a known right.”<sup>18</sup> The record shows that, prior to the filing of RF’s application, Lebanon sought on multiple occasions to notify the Commission of the error and have its authorization corrected to specifically include the inadvertently omitted frequency.<sup>19</sup> Under these circumstances, we find that RF has failed to show inexcusable delay on Lebanon’s part in asserting its rights.

10. Further, RF states that its Motion to Set Aside is incorporated into its Petition, and argues that the *Order* failed to address certain arguments raised in its Motion.<sup>20</sup> First, RF states that the Commission acted improperly when it modified Lebanon’s authorization without requiring Lebanon to file a modification application.<sup>21</sup> We find no merit in this argument because the “modification” that RF references was not in fact a modification, but rather the correction of the clerical error in failing to include 454.125 MHz on Lebanon’s construction permit. As set forth above, the June 1979 *Public Notice* specifically indicated that Lebanon’s application requesting authority to operate on 454.125 MHz was granted. Thus, the August 1993 license correction and reissuance of Lebanon’s authorization was not a subsequent license modification to add a frequency for which Lebanon had not previously sought authority to operate.

11. Second, RF argues that Lebanon’s August 5, 1993 letter to the Mobile Services Division<sup>22</sup>

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<sup>17</sup> Petition for Reconsideration at 3.

<sup>18</sup> Western Union International, Inc., *Memorandum Opinion and Order*, 70 FCC 2d 1896, 1903, ¶ 36 (1979).

<sup>19</sup> See Lebanon’s Opposition to RF’s Petition for Reconsideration, filed January 27, 2000, at 7. On March 13, 1980, Lebanon filed FCC Form 403 with the Commission indicating the completion of construction and specified both frequencies, including the inadvertently omitted frequency, 454.125 MHz. On June 19, 1986, Lebanon filed a letter seeking correction of its authorization. On February 7, 1989, Lebanon filed an application to renew its license and included frequency 454.125 MHz. In its renewal application, Lebanon also referenced its filing of the June 19, 1986 letter seeking correction. On February 15, 1990, Lebanon again filed a letter seeking correction of its authorization. On August 5, 1993, Lebanon filed its third letter seeking correction of its authorization.

<sup>20</sup> Petition for Reconsideration at 3.

<sup>21</sup> Motion to Set Aside at 2.

<sup>22</sup> The Mobile Services Division of the Common Carrier Bureau subsequently became the Commercial Wireless Division of the Wireless Telecommunications Bureau.

seeking correction of its authorization constituted a violation of the Commission's *ex parte* rules.<sup>23</sup> We need not reach the merits of RF's *ex parte* argument, however, because RF was not prejudiced by Lebanon's contact with the Mobile Services Division, which was a further attempt in its ongoing effort to correct its authorization to include the inadvertently omitted frequency.<sup>24</sup> Nonetheless, even if one assumes, *arguendo*, that Lebanon's August 5, 1993 letter to the Mobile Services Division was an inappropriate *ex parte* contact, RF still was not prejudiced by the contact because RF's application could not be granted under the circumstances as described above. As indicated herein, the Commission's clerical failure to include 454.125 MHz on Lebanon's construction permit does not result in a revocation of Lebanon's license, nor does it operate as a dismissal of Lebanon's earlier-filed application.

12. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the Petition for Reconsideration filed on January 19, 2000 by Robert Fetterman d/b/a RF Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris, Deputy Chief  
Commercial Wireless Division  
Wireless Telecommunications Bureau

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<sup>23</sup> *Id.* at 4-5; see 47 C.F.R. § 1.1200.

<sup>24</sup> See fn. 19, *supra*.