

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

In the Matter of)
)
Petitions for Reconsideration of dismissal of license) File Nos. 0006735934, 0006680342,
applications in the 3650-3700 MHz Wireless) 0006736080, 0006732885, 0006766439,
Broadband Radio Service) 0006788189, 0006781669
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ORDER ON RECONSIDERATION

Adopted: October 6, 2015

Released: October 6, 2015

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny the petitions for reconsideration filed by Tele-Page, Inc. (Tele-Page), Texoma Communications, LLC (Texoma), Mahaska Communications Group, LLC (Mahaska), Nick Challis (Challis), the City of Ellensburg, Washington (City of Ellensburg), Professional Satellite Services, Inc. (PSS), and Dakota Midstream, Inc. (Dakota) (collectively, Petitioners) of the orders dismissing the above captioned applications to provide service in the 3650-3700 MHz band. We grant the applications for waiver of section 90.1307(b) of the Commission’s rules filed by Tele-Page and Texoma and reinstate and grant their applications.

II. BACKGROUND

A. Procedural Background

2. On December 12, 2012, the Commission released a Notice of Proposed Rulemaking and Order (NPRM) that proposed to establish a new Citizens Broadband Radio Service in the 3550-3650 MHz band. The NPRM also included a supplemental proposal to include the adjacent 3650-3700 MHz band in the new Citizens Broadband Radio Service. Under the supplemental proposal, the Commission anticipated providing “existing 3650-3700 MHz licensees” with a reasonable period of time to transition “from their existing system to the new licensing regime,” and sought comment on this transition period, including the cost to “existing service providers.”

3. The Commission elaborated further on this proposal in subsequent notices in the same docket. On November 1, 2013, it released a Licensing Public Notice, seeking additional comment on this

1 File Nos. 0006735934 (Tele-Page Petition), 0006680342 (Texoma Petition), 0006736080 (Mahaska Petition), 0006766439 (Challis Petition), 0006732885 (City of Ellensburg Petition), 0006781669 (PSS petition), and 0006788189 (Dakota Petition).

2 Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, Notice of Proposed Rulemaking and Order, 27 FCC Rcd 15594 (2012) (3.5 GHz NPRM).

3 3.5 GHz NPRM, 27 FCC Rcd at 15621-22, ¶¶ 81-82.

transition, including protections for “incumbent operators.”⁴ On April 23, 2014, the Commission released a *Further Notice of Proposed Rulemaking (FNPRM)*, noting again that certain commenters had urged that “existing 3650-3700 MHz users” should be provided with a period to transition to the new framework.⁵ The *FNPRM* recognized “the significant investment that incumbent 3650-3700 MHz licensees have made,” and proposed specific rules designed to accommodate that investment.⁶ Under these proposed rules, “existing 3650-3700 MHz operations” would be “grandfathered” for a period of five years after the effective date of the proposed rules.⁷ Under the rules proposed in the *FNPRM* to address existing 3650-3700 MHz licensees, eligibility would be limited to entities “authorized under this Part as of [adoption date],” and no new licenses would be issued after that date.⁸

4. On April 17, 2015, the Commission adopted a *Report and Order and Second Further Notice of Proposed Rulemaking (3.5 GHz Order)* that established a new Citizens Broadband Radio Service in the 3550-3700 MHz band (3.5 GHz Band).⁹ The *3.5 GHz Order* adopted the supplemental proposal to include the 3650-3700 MHz band. However, the Commission again recognized that many incumbents in that band had made “substantial investments in equipment deploying various services in the band,” and accordingly established specific protections designed to preserve that “existing . . . investment” of these “prior existing 3650-3700 MHz licensees.”¹⁰ The Commission also adopted its proposal to provide “grandfathered” status to existing licensees in the band during a transition period. This grandfathering period extends for five years after the foregoing adoption date of the order, with a further extension for those existing licensees licensed prior to January 8, 2013, the date that the supplemental proposal in the *NPRM* was published in the Federal Register. Those existing licensees that obtained their licenses after that date were not entitled to an extension of the five-year period, because the Commission found that they “were on notice of our supplemental proposal . . . before obtaining their licenses,” and that according them more than a five-year priority would unnecessarily curtail the spectral efficiencies contemplated by the new rules.¹¹ Section 90.1307(b) of the new rules also stipulates that “The Commission shall issue no new licenses . . . under this section after April 17, 2015,”¹² *i.e.*, the adoption date of the rules.

B. Tele-Page

5. Tele-page filed its license application on April 1, 2015, and proposed to provide service as a common carrier. On April 8, 2015, Tele-page’s application was placed on public notice as accepted for filing. The public notice provided that acceptance for filing was “subject to the pre-grant notice and petition procedure of Section 309 of the Communications Act of 1934, as amended.”¹³ The application

⁴ Commission Seeks Comment on Licensing Models and Technical Requirements in the 3550-3650 MHz Band, *Public Notice*, 28 FCC Rcd 15300, ¶ 51 (2013)(*Licensing Public Notice*).

⁵ Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, *Further Notice of Proposed Rulemaking*, 29 FCC Rcd 4273, ¶ 164 (2014) (*3.5 GHz FNPRM*).

⁶ *Id.* ¶ 165.

⁷ *Id.* ¶ 166, app. B (section 90.1338).

⁸ *Id.* app. B (sections 90.1303, 90.1307) (brackets in original). These brackets served as a placeholder for the date of adoption of the proposed rules.

⁹ See Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band, GN Docket No. 12-354, *Report and Order and Second Further Notice of Proposed Rulemaking*, 30 FCC Rcd 3959 (2015) (*3.5 GHz Order*).

¹⁰ *3.5 GHz Order*, 30 FCC Rcd at 4074-76, ¶¶ 394-99.

¹¹ *Id.* at ¶ 401.

¹² *Id.* at app. A (47 C.F.R. § 90.1307(b)).

¹³ *Public Notice*, FCC Report No. 10403 (rel. Apr. 8, 2015), at 53. See 47 U.S.C. § 309(b).

was dismissed by letter dated May 5, 2015, “in accordance with the [3.5 GHz Order].”¹⁴ The Bureau’s letter noted that the 3.5 GHz Order “directed that the Commission shall issue no new licenses under Part 90 Subpart Z . . . after April 17, 2015”¹⁵

6. Tele-Page contends that the rules adopted in the 3.5 GHz Order and relied upon by the Bureau were not made effective until 30 days after that order was published and, as such, the Bureau lacked authority to enforce that rule.¹⁶ Tele-Page also contends that the Commission failed to provide notice of its intent to dismiss applications pending on the adoption date of the 3.5 GHz Order and departed from its past practice of continuing to process pending applications. Alternately, Tele-page argues that, even if the Bureau had the authority to dismiss its license application, the specific circumstances of the dismissal justify a waiver of section 90.1307 and reinstatement of Tele-page’s application.¹⁷

C. Texoma

7. Texoma filed its license application on February 22, 2015, and proposed to provide service as a common carrier. On March 4, 2015, Texoma’s application was placed on public notice as accepted for filing.¹⁸ As in Tele-Page’s case, the public notice provided that acceptance for filing was “subject to the pre-grant notice and petition procedure of Section 309 of the Communications Act of 1934, as amended.” The application was dismissed by letter dated May 5, 2015, “in accordance with the [3.5 GHz Order].”¹⁹ The Bureau’s letter noted that the 3.5 GHz Order “directed that the Commission shall issue no new licenses under Part 90 Subpart Z . . . after April 17, 2015”²⁰

8. Texoma contends that its application was “ripe for grant” before April 17, 2015, and that built-in delays from Bureau’s auto-grant process cannot form the basis for dismissal of an application that was eligible to be granted prior to that date.²¹ Texoma also raises arguments similar to those raised by Tele-page, and alternatively seeks a similar waiver.

D. Other Petitions

9. Three of the remaining petitioners (the City of Ellensburg, Mahaska, and Challis) filed their applications for a license in the 3650-3700 MHz band on or before the April 17, 2015, date referred to in Section 90.1307(b) of the new rules. They argue variously that filing by that deadline, or having had their applications accepted for filing by that deadline, entitles them to grant of their applications notwithstanding the change in the Commission’s rules.²² Challis argues that accepting its application fee to process an application “which will be, not may be, denied, is fraud.”²³

10. The two remaining petitioners (Dakota and PSS) filed their applications after April 17, 2015. Dakota argues that its application should be reinstated because it was unaware that the licensing rules had

¹⁴ Tele-Page Notice of Dismissal. See *Public Notice*, FCC Report No. 10494 (rel. May 13, 2015), at 17.

¹⁵ Tele-Page Notice of Dismissal.

¹⁶ Tele-Page Petition at 3-5.

¹⁷ *Id.* at 5-6.

¹⁸ See *Public Notice*, Report No. 10319 (rel. March 4, 2015).

¹⁹ Texoma Notice of Dismissal. See *Public Notice*, FCC Report No. 10494 (rel. May 13, 2015), at 17.

²⁰ Texoma Notice of Dismissal.

²¹ Texoma Petition at 3-4.

²² See City of Ellensburg Petition and Mahaska Petition.

²³ See Challis Petition. We note that the Commission’s rules make clear that application fees “will not be refundable to the applicant irrespective of the Commission’s disposition” of the application, subject to limited exceptions not applicable to Challis. 47 C.F.R. § 1.1110. See also 47 U.S.C. § 158.

changed and it had already purchased equipment for use in the 3650-3700 MHz band.²⁴ PSS notes that if it “had known about the deadline we would have gladly registered within that time frame,” that “that was our responsibility and we do understand the FCC’s position,” but that it seeks to ensure continued quality of service for the hundreds of customers in its area that have come to depend upon it for broadband internet service.²⁵

III. DISCUSSION

A. Petitions for Reconsideration

11. Tele-Page, Texoma, the City of Ellensburg, Mahaska, and Challis contend that, since their license applications were filed on or before April 17, 2015, their applications should not have been dismissed and should be reinstated. Dakota and PSS request reconsideration of the Bureau’s dismissal of license applications filed after April 17, 2015. We deny these petitions and find that the Bureau’s actions in dismissing these applications were consistent with the Commission’s instructions as well as prior Commission practice.

12. Section 90.1307 of the rules, adopted in the *3.5 GHz Order*, clearly provide that the Commission “shall issue no new licenses . . . under this section after April 17, 2015,” with exceptions for incumbent licensees not relevant here. All of the Bureau orders acting on the applications at issue in these cases were issued in May 2015, and each of them was consistent with and required by that mandate. Except for the Texoma application, all of them were either filed on or after that date or were otherwise not “ripe for grant” until after that date.²⁶ As to those, the Bureau had no discretion under the Commission’s mandate to grant the application.

13. In the case of Texoma, it notes that its application was “ripe for grant” on April 4, 2015,²⁷ which was 13 days before the April 17 date established in the *3.5 GHz Order*. Under Section 309 of the Act, however, the Bureau is required to determine, “in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application, . . . upon examination of such application and upon consideration of such other matters as the Commission may officially notice.”²⁸ Texoma advances no basis for its implicit view that the Bureau was required to complete this required public interest analysis during that thirteen-day period,²⁹ or that the analysis could not reasonably have awaited consideration of the *3.5 GHz Order*, which the Commission had announced on March 25, 2015, had been included on its April 17 tentative meeting agenda.³⁰ In light of its statutory obligations to examine Texoma’s application under the Section 309 public interest standard, and the Commission’s concerns in the previous *FNPRM* about limiting Part 90 Subpart Z use of this band to existing incumbent licensees, the Bureau’s processing of this application lay well within its “broad discretion” to “fashion [its] own rules of procedure and to pursue methods of inquiry capable of

²⁴ See Dakota Petition.

²⁵ See PSS Petition.

²⁶ Tele-Page Petition at 2 (application not “ripe for grant” until May 9, 2015). Although the City of Ellensburg and Mahaska applications, like the Tele-page application, were accepted for filing on April 8, 2015, as noted above the public notice accepting such applications for filing provided that they were accepted subject to the 30-day pre-grant notice and petition procedure of Section 309.

²⁷ Texoma Petition at 2.

²⁸ 47 U.S.C. § 309(a).

²⁹ Indeed, Texoma’s argument proceeds from the premise that the application was not even scheduled for possible grant until after April 17. Texoma Petition at 3.

³⁰ FCC News, FCC Announces Tentative Agenda for April Open Meeting, Mar. 27, 2015.

permitting [it] to discharge [its] multitudinous duties.”³¹

14. Tele-Page and Texoma raise two additional arguments. First, they argue that the rule cutting off grants of new Part 90 Subpart Z licenses as of April 17, 2015, did not actually become effective until July 23, 2015, because the *3.5 GHz Order* provided that the new rules adopted therein “shall become effective thirty (30) days after publication of the text or summary thereof in the Federal Register.”³² Second, they argue that the Commission failed to provide sufficient notice of its intent to dismiss applications pending on the adoption date of the *3.5 GHz Order*. We find no merit in either of these arguments.

15. *April 17 Effective Date*. We do not interpret the Commission’s general provision for a July 23 effective date, which provides for advance notice to interested parties of its substantive rules, to have been intended to rewrite the same order’s own specific April 17 cutoff date for purposes of the staff’s processing of applications. That order emphasized the public interest benefits of transitioning to a new Part 96 regulatory regime permitting use of a much larger band, modified only to the extent there was a countervailing need to accommodate the “substantial investments” made by “prior existing . . . licensees.”³³ Petitioners do not qualify as such, and as new applicants have had no such significant investment. Indeed, the Commission’s determination to begin the five-year transition period on April 17 (the adoption date of the order) is inconsistent with any intention to permit the grant of applications between April 17 and July 23. In any event, there would be no purpose in reinstating the applications, which the new rules now provide may not be granted, even under petitioners’ theory. For the foregoing reasons, we find no reason to do so.

16. *Notice*. Contrary to petitioners’ argument, interested parties had clear notice that the supplemental proposal advanced in the *NPRM* in 2012 might well lead to a cutoff for new Part 90 Subpart Z applications as of the adoption date of the *3.5 GHz Order*. The rationale repeatedly advanced for grandfathering – protecting the substantial investment made by “existing” licensees and “incumbent operators” – was coupled with a specific proposal in the *FNPRM* to limit eligibility to those licensed as of that adoption date.³⁴ This proposal was released almost a year prior to the *3.5 GHz Order*. Thus, the Commission provided more than enough time for interested parties to obtain licenses before enacting the proposed rule change, especially given the low financial and administrative costs for entering the band.³⁵

B. Tele-Page and Texoma Requests for Waivers

17. Tele-Page and Texoma also contend that their circumstances warrant a waiver of the Commission’s rules and a reinstatement of their applications. After careful review of these requests, we find that Tele-Page and Texoma have satisfied the requirements of the section 1.925 and that granting their requests would serve the public interest.

18. Under section 1.925, the Commission may grant an applicant’s request for a waiver if it is shown that: “(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable

³¹ *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965). See also 47 U.S.C. § 154(j).

³² *3.5 GHz Order*, 30 FCC Rcd at 4092, ¶ 453.

³³ *Id.* at ¶¶ 395-412.

³⁴ See *supra*, ¶¶ 3-4.

³⁵ Nor does establishing a cutoff date for granting applications involve any rule prescribing “conduct that is forbidden or required.” Tele-Page Petition at 4, quoting *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S.Ct. 2307, 2317 (2012) (\$1.24 million fine, potential for increased penalties, and reputational injury resulting from enforcement of indecency statute).

alternative.³⁶ Texoma and Tele-Page argue that their circumstances satisfy either prong of the waiver standard.³⁷

19. With respect to the first prong, Tele-Page and Texoma contend that the underlying purpose of section 90.1307(b) may be to cut off licensing under Part 90 to ensure that the 3650-3700 MHz band is put to its most productive use. They further argue that this purpose could not have been intended to require the dismissal of applications filed almost two months (in Texoma's case) or more than two weeks (in Tele-Page's case) before the freeze was imposed, and that reinstatement of their applications would serve the public interest.

20. We reject these arguments. As set forth above, the underlying purpose of the rules adopted in the *3.5 GHz Order* pertaining to 3650-3700 MHz band licensees was to facilitate a smooth transition to the new Part 96 regulatory framework while minimizing the impact on the substantial investments by many "prior existing . . . licensees."³⁸ As noted previously, to achieve this goal, the Commission proposed in the *FNPRM* to cease issuing licenses after the adoption date of the *3.5 GHz Order*. It cannot be said that the purpose of a rule would be undermined by enforcing the exact terms proposed and then implemented by the Commission.

21. Under the second prong of section 1.925, Texoma and Tele-Page also argue that due to their "unique and unusual" factual circumstances, strictly applying section 90.1037(b) would be inequitable, unduly burdensome, and contrary to the public interest.³⁹ They emphasize that they filed their applications before the adoption date of the *3.5 GHz Order*. Tele-Page is a fixed wireless Internet service provider serving rural and mountainous Scott County, Tennessee. It claims that it has a waiting list of more than 300 prospective customers that would like to receive its fixed broadband service, for which the 3650-3700 MHz band offers the best combination of propagation, cost and equipment solutions, and to which it will be unable to provide service without reinstatement and grant of its application.⁴⁰ Texoma is a fixed wireless Internet service provider serving the Sherman, Texas, market. It claims that it has received orders from approximately 260 prospective customers who would be effectively denied broadband service absent such a remedy.⁴¹

22. We find that both Tele-Page and Texoma have described unique and unusual factual circumstances that warrant a waiver of section 90.1307(b) and that granting these requests would serve the public interest. As noted above, parties had notice from the *FNPRM* that applications would no longer be granted after the adoption date of the *3.5 GHz Order*. However, we believe that in the foregoing circumstances the dismissal of applications prepared and filed in accordance with the Commission's rules prior to the adoption of the *3.5 GHz Order* would be unduly burdensome and could have negative effects on broadband competition in the affected areas. In addition, on balance, granting these waiver requests would not have a meaningful negative impact on the future development of the Citizens Broadband Radio Service. Because section 90.1338 accords "grandfathered" status only to fixed or base station registrations filed in ULS on or before April 17, 2015,⁴² and because neither Tele-Page nor Texoma has registered any such sites, granting their license applications will not pose the problem of restricting the flexibility of new Citizens Broadband Radio Service offerings that formed the basis for the cutoff of applications prescribed by the *3.5 GHz Order*. Moreover, one of the Commission's stated goals

³⁶ 47 C.F.R. § 1.925(b)(3).

³⁷ See Texoma Petition at 6-7; Tele-Page Petition at 5-7.

³⁸ See *supra* ¶ 4.

³⁹ See Tele-Page Application at 2; Texoma Application at 2.

⁴⁰ Tele-Page Application at 1, 6.

⁴¹ Texoma Petition at 1, 7.

⁴² See 47 C.F.R. § 90.1338.

in creating the Citizens Broadband Radio Service was to “add much-needed capacity to meet the ever increasing demands of wireless innovation.”⁴³ Denying these prospective customers the opportunity to purchase wireless broadband service from Texoma or Tele-Page would thus seem inconsistent with the Commission’s public interest goals for this band, and for promoting broadband deployment in such areas.

23. We therefore grant the waiver petitions, order the captioned applications of Texoma and Tele-Page reinstated, and grant the requested licenses.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that, pursuant to Section 1.106 of the Commission’s rules, 47 C.F.R., § 1.106, the Petitions for Reconsideration filed by Petitioners are DENIED.

25. IT IS FURTHER ORDERED that, pursuant to Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, the waiver petitions filed by Tele-Page and Texoma are granted and, accordingly, their license applications are granted.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman
Chief, Wireless Telecommunications Bureau

⁴³ See *3.5 GHz Order*, 30 FCC Red at 3961, ¶ 1.