

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

In the Matter of)	
)	
Application of Broadband Wireless Access Services)	
)	
)	File No. 9600083
For Authority to Construct and Operate 38.6 - 40.0 GHz Microwave Radio Service Network in Fredericksburg, Virginia)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 2000

Released: September 15, 2000

By the Commission:

1. The Commission has before it an Application for Review filed by Broadband Wireless Access Services (Broadband) on May 10, 2000.¹ Broadband requests review of an April 10, 2000 *Order* by the Public Safety and Private Wireless Division dismissing the above-captioned application for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.²

2. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. The Commission has established and affirmed a processing policy concerning 39 GHz channels that includes the dismissal of (a) applications that failed to meet the thirty-day public notice requirement as of November 13, 1995; (b) all new applications, major modification applications and amendments filed on or after November 13, 1995; and (c) applications whose mutual exclusivity was not resolved by December 15, 1995 and amendments resolving mutual exclusivity that were filed on or after December 15, 1995.³ In addition, the Commission's Rules provide for the dismissal of mutually exclusive applications and late-filed competing applications.⁴

¹Broadband Wireless Access Services Application for Review (filed May 10, 2000) (Application for Review).

²AA&T Wireless Services, *Order*, DA 00-795 (WTB PSPWD rel. Apr. 10, 2000) (April 10 *Order*).

³ 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, 18639-45 ¶¶ 83-97 (1997), *aff'd*, Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 14 FCC Rcd 12428, 12440-51 ¶¶ 19-44 (1999).

⁴ See 47 C.F.R. § 21.31 (b)(2)(i) (1995); 47 C.F.R. § 101.45(b)(2)(i) (disposition of mutually exclusive applications). See also 47 C.F.R. § 1.934 (dismissal of defective applications).

3. Commission staff dismissed Broadband's application for authorization to provide service in the 39 GHz band because, as of December 15, 1995, it was mutually exclusive with an application filed by No Wire L.L.C. to provide the same type of service.

4. In the alternative, Broadband requests a stay of the April 10 *Order*⁵ pending the outcome of related proceedings before the United States Court of Appeals for the District of Columbia.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.⁷ Broadband argues that a stay of the April 10 *Order* would serve the public interest by eliminating the need for duplicative litigation and remove uncertainties as to the availability of the subject frequency assignments with respect to the conflicting rights that may attach as a result of the 39 GHz auction.⁸ We disagree.

5. First, the plain language of the test to receive a stay of a Commission action provides that a stay request shall be granted only upon a finding that all four conditions are satisfied.⁹ Thus, where any one of the four conditions is not satisfied, the subject stay request will not be granted. Broadband fails to address the first three prongs of this test. As a result, Broadband cannot satisfy the requirements for a stay.

6. Second, Broadband argues that the public interest benefits support the grant of a stay in this matter. Again, we disagree. We are not persuaded that Broadband's alleged injuries are sufficient to warrant a stay. In this connection, we note that consolidating this matter with the related proceedings before the court would not be duplicative. Moreover, if Broadband wholly prevails in its judicial appeal of the Commission's decision, then we would "forthwith give effect thereto."¹⁰ Finally, we believe that reinstating Broadband's application would frustrate the goals underlying the 39 GHz 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."¹¹

7. In light of the above, we find that Broadband has not shown an injury warranting

⁵Application for Review at 1, 6.

⁶See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (Consolidating Case Nos. 99-1361-1362) (D.C. Cir. 1999).

⁷See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

⁸Application for Review at 6.

⁹See *Washington Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985).

¹⁰See 47 U.S.C. § 402(h).

¹¹*July 29 MO&O*, 14 FCC Rcd at 12437-38; Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Memorandum Opinion and Order*, 12 FCC Rcd 2910, 2917 ¶ 15 (1997); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rulemaking and Order*, 11 FCC 4930, 3988-89 ¶¶ 121-124 (1996).

injunctive relief.¹² Accordingly, we deny Broadband's request for a stay of the April 10 *Order*.

8. We have analyzed the Application for Review and find that the Commission staff properly decided the matters raised. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

9. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(5), and Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review filed by Broadband on May 10, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹²*Washington Gas Co. v. FERC*, 758 F.2d at 669.