

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

In the Matter of the Application of	)	
	)	
BROADBAND WIRELESS ACCESS	)	File No. 9600081
SERVICES	)	
	)	
To provide 39 GHz Point-to-Point Microwave	)	
Service in the Area of Livermore, CA	)	

**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 1, 2000. Broadband requests Commission review of an *Order*<sup>1</sup> by the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (Division) dismissing the above-captioned application for authorization to provide service in the 38.6 to 40.0 GHz (39 GHz) band.<sup>2</sup>

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.<sup>3</sup> In addition, the Commission's Rules provide for the dismissal of mutually exclusive

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<sup>1</sup> See AA&T Wireless Services, *Order*, 15 FCC Rcd 5902 (WTB PSPWD rel. Mar. 30, 2000). Broadband Wireless Access Services was formerly known as "AA&T Wireless Services." The name change became effective on March 7, 2000. See Letter from Walter H. Sonnefeldt, Esq. to Mary Shultz, Chief, Licensing and Technical Analysis Branch (filed Mar. 7, 2000).

<sup>2</sup> See Broadband Wireless Access Services, Application for Review (filed May 1, 2000).

<sup>3</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, 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).

applications and late-filed competing applications.<sup>4</sup>

3. The above referenced application was dismissed because it violated the 39 GHz processing policy. Specifically, the application was dismissed because the application was mutually exclusive with an application filed by Bay Area Teleport, Inc. (BAT) and Broadband's application was filed well beyond the sixty-day cutoff date established by BAT's application. Therefore, we uphold the staff decision for the reasons stated therein. There is no reason to disturb it.

4. In the alternative, Broadband requests a stay of the *Order*,<sup>5</sup> pending the completion of a multi-party appeal of the 39 GHz policies currently before the United States Circuit Court for the District of Columbia.<sup>6</sup> 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 stay will not harm the other interested parties, and 4) the grant would serve the public interest.<sup>7</sup> Broadband argues that a stay of the *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.<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> Finally, we believe that reinstating Broadband's application would frustrate the underlying 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."<sup>11</sup>

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<sup>4</sup> 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).

<sup>5</sup> See AA&T Wireless Services, *Order*, 15 FCC Rcd 5902 (WTB PSPWD rel. Mar. 30, 2000).

<sup>6</sup> See *Bachow Communications, Inc. v. FCC*, Case No. 99-1346 (consolidating Case Nos. 99-1361 and 99-1362).

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

<sup>8</sup> Application for Review at 7.

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

<sup>10</sup> See 47 U.S.C. § 402(h).

<sup>11</sup> *July 29 MO&O*, 14 FCC Rcd at 1437-38; 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 (continued....)

7. In light of the above, we find that Broadband has not shown any injury warranting injunctive relief.<sup>12</sup> Accordingly, we deny Broadband's request for a stay of the *Order*.

8. 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 Wireless Access Services on May 1, 2000 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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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 Rcd 4930, 4988-89 ¶¶ 121-124 (1996).

<sup>12</sup> *Washington Gas v. FERC*, 758 F.2d at 669.