

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

In the Matter of Applications of)
DATAFON, INC.) File Nos. 687938-9
For Private Carrier Paging) 687941-61
On Frequency 929.6875 MHz)

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2001

Released: March 29, 2001

By the Commission:

1. The Commission has before it an Application for Review filed by Datafon, Inc. (Datafon) on November 8, 1999. Datafon seeks review of an order issued by the Policy and Rules Branch (Branch) of the Wireless Telecommunications Bureau's Commercial Wireless Division, which denied reconsideration of a decision by the former Land Mobile Branch (Land Mobile Branch) dismissing the above-captioned applications for private carrier paging authorization on 929.6875 MHz (Datafon Applications). For the reasons discussed below, we affirm the Branch's action and deny Datafon's Application for Review.

2. Datafon states that, pursuant to section 90.175 of the Commission's rules, it submitted the Datafon Applications for frequency coordination to the Commission-appointed frequency coordinator, the National Association of Business and Educational Radio, Inc. (NABER). On November 18, 1994, NABER filed the Datafon Applications with the Commission, but without the specific frequency recommendation required by our rules. Because the applications were not coordinated, the Land Mobile Branch dismissed the Datafon Applications for lack of frequency coordination on May 8, 1995. On May

1 Datafon, Inc., 14 FCC Rcd. 17355 (Commercial Wireless Div. 1999) (Branch Order). We note that the caption in Datafon's pleading indicates that it seeks review of the dismissal of "FCC File Nos. 68130-20." However, Datafon cites, at p.1, fn. 1 of its Application for Review, to DA No. 99-2126, which is a separate Branch Order also released October 8, 1999 addressing the dismissal of Datafon's FCC File Nos. 687938-9 and 687941-61. A review of the body and substance of the pleading, including Datafon's references to application/pleading filing dates and Commission action dates supports the finding that Datafon is seeking review of the dismissal of File Nos. 687938-9 and 687941-61. We further note that we are contemporaneously adopting an order addressing a substantively identical Application for Review filed by Datafon's affiliate, CGSA-Minneapolis, Inc., regarding the dismissal of File Nos. 680392-399, 680673-678, 680643-647 and 680651-672.

2 The Land Mobile Branch was later merged into the Licensing and Technical Analysis Branch.

3 Application for Review at 1, 4. NABER has since become part of the Personal Communications Industry Association.

19, 1995, Datafon filed a Petition for Reconsideration (Petition), in which it argued that the Commission should have retained the Datafon Applications in pending status until it resolved a pending waiver request filed by a third party, Greenline Partners, Inc., that potentially affected the availability of 929.6875 MHz.⁴

On reconsideration, the Branch affirmed that the Datafon Applications were defective and could not be processed without the frequency coordination by NABER.⁵ The Branch further determined that it had no obligation to hold the applications in pending status until Datafon was able to obtain frequency coordination.⁶ Accordingly, the Branch denied Datafon's Petition.

3. In its Application for Review, Datafon again asserts that its applications should not have been dismissed and should be reinstated. We hold that the Branch correctly affirmed the Land Mobile Branch's decision and denied Datafon's Petition. Because of the existence of prior-filed applications seeking authority to operate on 929.6875 MHz, NABER was unable to recommend grant of the Datafon Applications to operate on this frequency.⁷ Without the specific frequency recommendation required by our rules, or an appropriate request for waiver of section 90.175, the Branch could not process the applications.⁸ Contrary to Datafon's assertion, the Branch was not required to hold the applications until Datafon could obtain necessary frequency coordination.⁹ The processing rules in effect for the 929 MHz band at this time did not provide for placing applications on a "wait list," and the Commission in fact had a policy *against* holding such applications while it processed earlier-filed applications.¹⁰

⁴ At the time that NABER received the Datafon Applications, a waiver request filed by Greenline Partners, Inc. (Greenline) was pending with the Commission. Greenline's Waiver Request sought nationwide exclusivity on the 929.6875 MHz frequency for a three-year time period without having to construct the requisite number of transmitters. In a separate order issued concurrently with the *Branch Order*, the Branch denied the Waiver Request and dismissed Greenline's applications. *Greenline Partners, Inc.*, 14 FCC Rcd 17369 (Commercial Wireless Div. 1999) (*Greenline Waiver Order*).

⁵ *Branch Order*, 14 FCC Rcd. at 17355-56, ¶ 2.

⁶ *Id.* at 17356, ¶ 2.

⁷ *See Waste Management, Collection & Recycling, Inc.*, 16 Communications Reg. (P & F) 237 (1999) (denying Application for Review of Land Mobile Branch dismissal and finding that a frequency coordinator's statement that it would have coordinated an application but for an earlier-filed and still pending application and waiver request did not constitute adequate frequency coordination).

⁸ *See* 47 C.F.R. § 90.129 (a) (1994) ("Each application received by the Commission must be accompanied by the applicable information listed below: (a) Evidence of frequency coordination as required by § 90.175."); 47 C.F.R. § 90.139 (c) ("Applications ... will be considered defective and may be dismissed unless accompanied by a [waiver] request in accordance with § 90.151 of this part."). Datafon did not request a waiver of the Commission's frequency coordination requirements.

⁹ Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, 103 F.C.C.2d 1093, 1100, ¶ 14 (1986)(Frequency Coordination Docket); *id.* at 1108, ¶ 29; *see also Memorandum Opinion and Order*, 16 Communications Reg. (P & F) at 240, ¶ 10 (stating that the rules require a decision identifying a frequency which the Commission can adopt intact).

¹⁰ *See, e.g., Valley County Water District*, 14 FCC Rcd. 18754, 18755, ¶ 4 (Pub. Safety & Private Wireless Div. 1999) ("[T]he Commission does not maintain a wait list for the frequency in question."); *Memorandum Opinion and Order*, 16 Communications Reg. (P & F) at 240, ¶ 11 ("[A]pplicants are not permitted to queue behind already-pending mutually exclusive applications."); *MGM Grand Hotel, Inc.*, 14 FCC Rcd 1784 (Pub. Safety & (continued....))

4. Datafon concedes that its applications were subject to the frequency coordination requirement, but argues that the applications should have been treated as acceptable for filing based on the Commission's 1986 *Frequency Coordination Order*, which allowed uncoordinated applications to be filed under some circumstances.¹¹ Datafon's reliance on the *Frequency Coordination Order* is misplaced. In that proceeding, the Commission allowed uncoordinated applications to be forwarded to the Commission for review where an applicant sought to contest the coordinator's recommendation to deny the applicant's request for a specific frequency, but recommend grant of an alternate frequency.¹² In such instances, the applicant was required to submit a technical justification for the requested frequency, and the applicant's submission and coordinator's alternate recommendation were to be submitted to the Commission for evaluation and decision.¹³ This procedure is irrelevant to Datafon's applications because Datafon did not contest NABER's decision not to recommend grant of Datafon's applications on 929.6875 MHz. Instead, because the applications could not be coordinated on that frequency, Datafon sought to have the Commission maintain the applications in pending status indefinitely until the previously filed application for the frequency was resolved. Contrary to Datafon's assertions, the *Frequency Coordination Order* does not require a policy of accepting and holding uncoordinated applications while earlier mutually exclusive applications are processed.¹⁴

5. We find that the Land Mobile Branch properly dismissed the Datafon Applications as defective, and the *Branch Order* properly upheld that dismissal.¹⁵ For the reasons stated above, we affirm the Branch's decision, and deny Datafon's Application for Review.

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Private Wireless Div. 1998) (dismissing applications filed without coordination for frequencies that were associated with an ongoing Commission proceeding).

¹¹ Application for Review at 4-5.

¹² See Frequency Coordination Docket at ¶ 110.

¹³ *Id.*

¹⁴ In denying Datafon's Petition, the Branch did not treat Datafon differently from similarly situated applicants. In the *Greenline Waiver Order*, the Commission explained that it was dismissing all applications forwarded by NABER that sought authorizations for transmitter sites on 929.6875 MHz because they failed to meet the Commission's frequency coordination requirements. *Greenline Waiver Order*, 14 FCC Rcd at 17371, ¶ 7. Datafon fails to identify how the Branch's actions toward it are inconsistent with the treatment of similarly situated requests.

¹⁵ See *Always Answering Service, Inc.*, 15 FCC Rcd. 3243, 3244-45, ¶ 5 (2000) (denying Application for Review of Branch decision dismissing applications submitted without requisite frequency coordination); 47 C.F.R. § 90.139(b) ("Applications which are incomplete with respect to answers, supplementary statements, execution, or other matters of a formal character shall be deemed defective and may be dismissed.")

6. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, the Application for Review filed by Datafon, Inc., on November 8, 1999 in the above-captioned matter is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary