

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

In re Application of)	
)	
Robert Fetterman d/b/a)	
RF Communications)	File No. 26834-CD-P-93
)	
For Authority to Operate a New)	
Domestic Public Land Mobile Radio)	
Service Station on Frequency)	
454.125 MHz at Trevorton, Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 2001

Released: April 11, 2001

By the Commission:

I. INTRODUCTION

1. This order addresses the Application for Review filed by Robert Fetterman d/b/a RF Communications (RF) on December 17, 1999.¹ RF seeks Commission review of a November 19, 1999 order of the Wireless Telecommunications Bureau, Commercial Wireless Division, Policy and Rules Branch (Division), which denied reconsideration of the dismissal of the above-captioned application.² For the reasons discussed below, we deny RF's Application for Review.

II. BACKGROUND

2. In July 1993, RF applied to operate a Domestic Public Land Mobile Radio Service station on 454.125 MHz at Trevorton, Pennsylvania.³ On February 10, 1994, the former Mobile Services Division of the Common Carrier Bureau dismissed RF's application as defective.⁴ In dismissing RF's application, the Mobile Services Division found that RF failed to: (1) identify co-channel station KSV-940, licensed to Richard Blyler d/b/a Lebanon Mobilefone (Lebanon); and (2) provide an interference study showing that RF's proposed facility would not cause harmful interference to Lebanon, as required by

¹ RF Application for Review, filed December 17, 1999 (Application for Review).

² Robert Fetterman, *Order on Reconsideration*, DA 99-2597 (Wireless Tel. Bur., rel. November 19, 1999) (*Reconsideration Order*).

³ *See Public Notice*, Report No. PMS-93-42 (Comm. Carr. Bur., rel. July 21, 1993).

⁴ Letter from John Cimko, Chief, Mobile Services Division, Common Carrier Bureau, Federal Communications Commission, to Kathleen A. Kaercher, Brown & Schwaninger, File No. 26834-CD-P-93, Reply 1600D2-SG, dated February 10, 1994 (*Dismissal Order*).

former rule section 22.15(b)(2). RF petitioned for reconsideration of the dismissal.

3. On reconsideration, 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. 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. In its *Reconsideration Order*, the Division upheld the original dismissal. Although Lebanon's 1979 construction permit did not list 454.125 MHz, the Division noted that the June 11, 1979 Public Notice of grant of the application did list the frequency,⁵ which the Division found to provide both proof and notice to RF that the frequency had been granted to Lebanon.⁶ 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.⁷

4. In its Application for Review, RF presents four arguments for Commission review: (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.⁸ RF also contends generally that the Bureau did not address the legal arguments raised in RF's *Petition for Reconsideration*.⁹

III. DISCUSSION

5. We have analyzed the Application for Review and conclude that the *Reconsideration Order* was correctly decided.¹⁰ 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.¹¹ A Public Notice

⁵ *Public Notice*, No. 966-A (Comm. Carr. 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)."

⁶ *Reconsideration Order* at 1.

⁷ *Id.*

⁸ Application for Review at 1-2.

⁹ Application for Review at 3.

¹⁰ On December 30, 1999, Lebanon filed a "Consent Motion for Extension of Time to File Opposition to Application for Review" that sought an extension of time until January 14, 2000 in which to file its Opposition to Application for Review (Opposition). Lebanon states that it was not timely served with RF's Application and that RF consents to the extension. While the Commission does not routinely grant motions for extensions of time, we find that an extension is appropriate under the circumstances set forth in Lebanon's motion and we have therefore considered Lebanon's Opposition.

¹¹ RF incorrectly cites rule sections 22.5 and 22.27(a) as not permitting the Commission to issue an authorization by public notice. Specifically, RF cites Commission rule section 22.27 (a)(3), which was not (continued....)

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.¹² 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.¹³

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.¹⁴ 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.¹⁵

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 construction permit 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 its construction permit, Lebanon received 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.¹⁶ 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 the channel. The issuance of a partial grant would have required the Bureau to inform the applicant of the reasons that its application was granted only in part or

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adopted until 1984, five years after the issuance of the *June 1979 Public Notice*. See Application for Review at 2, Ex. A at 4-5. Further, Lebanon's 1978 applications were filed under Part 21 of our rules, as our Part 22 rules were not then in effect. See *Domestic Fixed Radio Services and Public Mobile Radio Services*, 44 Fed. Reg. 60,532, 46 Rad. Reg. 2d (P&F) 652 (1979) (separating Parts 21 and 22 of the rules into discrete rule parts without substantive changes).

¹² See June 11, 1979 Public Notice.

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

¹⁴ Application for Review at 4.

¹⁵ 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).

¹⁶ Application for Review at 3, Exh. A at 5-6.

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 frequency¹⁷ and claims that Lebanon failed to perform its duty to inform the Commission of any error in the authorization issued by the Commission. RF also states that the Bureau's decision is contrary to the "Commission's oft-stated demand that licensees are responsible for the contents of their instruments"¹⁸ 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."¹⁹ 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.²⁰ Under these circumstances, we find that RF has failed to show inexcusable delay on Lebanon's part in asserting its rights.

10. In its Application for Review, RF generally argues that the Bureau's decision "is contrary to those statements of law and fact contained within RF's earlier filed Petition for Reconsideration, which is attached as Exhibit A and incorporated herein."²¹ For the reasons stated above, we find that the Bureau's decision is well supported and is consistent with Commission rules and policies. To the extent that RF seeks Commission review, through generalized incorporation by reference of its Petition for Reconsideration, of issues other than the four specifically identified in its Application for Review, we find that its pleading fails to comply with Section 1.115 (b)(1), which provides that applications for review shall "concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law."²² We also find that RF's pleading violates Section 1.115 (b)(2),

¹⁷ Application for Review at 3.

¹⁸ Application for Review at 5.

¹⁹ Western Union International, Inc., *Memorandum Opinion and Order*, 70 FCC 2d 1896, 1903, ¶ 36 (1979).

²⁰ 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. See Opposition, Ex. 2, Letter from James S. Finerfrock, Attorney for Lebanon, to Kevin J. Kelly, Chief, Mobile Services Division, File No. 22756-CD-P/ML-01-85, dated June 19, 1986 (requesting correction to recent construction permit and the inclusion of 454.125 MHz at Location 2 for Station KSV940) (June 19, 1986 Letter); 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. As indicated herein, Lebanon also sought correction of the error by letter in 1990 and again in 1993. See fn 11, *infra*; Opposition, Ex. 2, Letter from James S. Finerfrock, Attorney for Lebanon, to Gregory J. Vogt, Chief, Mobile Services Division, File No. 23837-CD-R-01-89, dated February 15, 1990 (requesting corrections to recent renewal authorization and the inclusion of 454.125 MHz at Location No. 2 for Station KSV940) (February 15, 1990 Letter); Opposition, Ex. 2, Letter from Paul G. Madison to John Cimko, Chief, Mobile Services Division, File No. 23837-CD-R-01-89, dated August 5, 1993 (requesting corrections to the authorization issued for Station KSV940 including the identification of frequency 454.125 MHz facilities) (August 5, 1993 Letter). On August 12, 1993, the Mobile Services Division corrected the clerical error by properly including 454.125 MHz on Lebanon's authorization.

²¹ Application for Review at 2.

²² 47 C.F.R. § 1.115 (b) (1).

which provides that applications for review must specify with particularity the factor(s) that warrant Commission consideration of the questions presented.²³

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 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 Robert Fetterman d/b/a RF Communications is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²³ 47 C.F.R. § 1.115 (b) (2).