

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

In the Matter of)
)
Amendment of Section 1.937 of the Commission's)
Rules Concerning Repetitious or Conflicting) WT Docket No. 02-57¹
Applications)

REPORT AND ORDER

Adopted: April 9, 2003

Released: April 16, 2003

By the Commission:

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this *Report and Order*, we amend Section 1.937 of our Rules² to prohibit the filing of any repetitious license application in the Wireless Radio Services within twelve months of the denial or dismissal with prejudice of a substantially similar application. We also streamline our rule barring repetitious applications by combining Sections 1.937(a)³ and (b).⁴ Our amendment of Section 1.937 will simplify and clarify our prohibition against repetitious applications. We believe that this action will promote the most efficient use of the Commission's resources by preventing the filing of such applications and barring applicants from initiating reexamination of such matters within a short time after our final decision thereon.

II. BACKGROUND

2. The Commission's Rules have long prevented the filing of repetitious license applications. Prior to 1998, the rules barring repetitious license applications were set forth in separate rule parts pertaining to each of the Wireless Radio Services.⁵ These rules generally prohibited the filing of a repetitious application within twelve months of the denial or dismissal with prejudice of a substantially

¹ The *Notice of Proposed Rule Making* in this proceeding erroneously listed the docket number as WT Docket No. 02-87. This was subsequently corrected by an *Erratum*. See Amendment of Section 1.937 of the Commission's Rules Concerning Repetitious or Conflicting Applications, *Erratum*, WT Docket No. 02-57, DA 02-3590 (WTB PSPWD rel. Dec. 27, 2002).

² 47 C.F.R. § 1.937.

³ 47 C.F.R. § 1.937(a). The current language of Section 1.937(a) is set forth in paragraph 2, *infra*.

⁴ 47 C.F.R. § 1.937(b). The current language of Section 1.937(b) is set forth in paragraph 2, *infra*.

⁵ See, e.g., 47 C.F.R. § 1.916 (1998) (barring repetitious applications in the private radio services); 47 C.F.R. § 22.121 (1998) (barring repetitious, inconsistent or conflicting applications in the public mobile services); 47 C.F.R. § 24.421 (1998) (barring inconsistent or conflicting applications in the personal communications services); 47 C.F.R. § 26.312 (1998) (barring inconsistent or conflicting applications in the general wireless communications services); 47 C.F.R. § 101.27 (1998) (barring repetitious applications in the fixed microwave services).

similar application.⁶ In 1998, the Commission consolidated its licensing rules for all Wireless Radio Services,⁷ and enacted Section 1.937 to replace its prior service-specific rules on the filing of repetitious or conflicting applications.⁸ Section 1.937 provides,

(a) Where the Commission has, for any reason, dismissed an application for a new station or for any modification of services or facilities with prejudice, or revoked the license for a radio station in the Wireless Radio Services, the Commission will not consider a like or new application involving service of the same kind to substantially the same area by substantially the same applicant, its successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of final Commission action.

(b) If an applicant has been afforded an opportunity for a hearing with respect to an application for a new station or an enlargement of service area, and the Commission has, after hearing or default, denied the application or dismissed it with prejudice, the Commission will not consider a like application for service of the same type to the same area by that applicant, or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, until after the lapse of 12 months from the effective date of final Commission action on the original application.

(c) If an appeal has been taken from the action of the Commission denying a particular application, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf of or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

(d) While an application is pending, any subsequent inconsistent or conflicting application submitted by, on behalf of, or for the benefit of the same applicant, its successor or assignee will not be accepted for filing.⁹

Section 1.937 and its antecedents were adopted to achieve sound administrative process by barring applicants from immediately re-litigating matters already decided.¹⁰

3. On March 20, 2002, the Commission released a *Notice of Proposed Rule Making* in which it proposed to amend Section 1.937 to clarify that the prohibition on repetitive applications applies to all types of license applications (*i.e.*, new applications and renewal applications), and applies equally to all dispositive actions, including dismissals with prejudice, denials, and revocations.¹¹ Comments were filed by the American Mobile Telecommunications Association, Inc. (AMTA). AMTA supports the Commission's effort to simplify its rules, but cautions the Commission to do so carefully so as not to

⁶ See, e.g., 47 C.F.R. §§ 1.916, 101.27 (1998).

⁷ See Biennial Regulatory Review - Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027 (1998).

⁸ See 47 C.F.R. § 1.937.

⁹ *Id.*

¹⁰ See *Salter Broadcasting, Memorandum Opinion and Order*, 6 FCC 2d 809, 814 ¶ 10 (1967) (*Salter*).

¹¹ Amendment of Section 1.937 of the Commission's Rules Concerning Repetitious or Conflicting Applications, *Notice of Proposed Rule Making*, 17 FCC Rcd 5628, 5630 ¶ 5 (2002) (*NPRM*).

apply the sanction to applications dismissed without prejudice.¹²

III. DISCUSSION

4. As currently written, Sections 1.937(a) and (b) detail specific applications that may not be repeated within twelve months of the denial or dismissal with prejudice of a substantially similar application. Specifically, applicants may not repeat applications for new stations, or for modification of services or facilities, or for licenses that have been revoked. Because they bar specific types of applications, these provisions could be interpreted as permitting the filing of other repetitious applications that are not specified in the rule. For example, although the Commission generally does not distinguish between applications for new service and applications for renewal,¹³ Section 1.937 does not specifically bar repetitious renewal applications. As a result, in at least one instance, a licensee has filed a repetitious application for the same service less than twelve months after the denial of his renewal application.¹⁴ Such cases can consume significant resources to re-litigate identical issues involving the same applicants very close in time.

5. In drafting Section 1.937, the Commission did not intend to permit repetitious renewal applications, or any other type of repetitious application. In fact, the Commission has previously held that dismissal of a renewal application is tantamount to denial or dismissal of a new application, thereby triggering the bar against repetitious applications.¹⁵ The Commission reasoned that the rule's goal--the attainment of sound administrative process by preventing the relitigation of decided matters--would be easily circumvented if applicants were free to refile for the same relief immediately after being denied such relief.¹⁶ Further, the Commission opined "that the same salutary principal--conducive to orderly administrative procedure--should apply equally in the case where an application for a renewal of license has been denied after a full hearing."¹⁷

6. The Commission, in the *NPRM*, saw no reason to treat applications repeating renewal applications differently from and more favorably than applications repeating applications for new service, and the record does not present any such reason.¹⁸ Indeed, we believe that all applications in the Wireless Radio Services should be subject to the same limitations. We also conclude that relitigating recently decided matters does not constitute an efficient use of Commission resources, and diverts attention from important matters needing resolution. Therefore, we hereby amend Section 1.937 to prohibit any repetitious application in the Wireless Radio Services within twelve months of the denial or dismissal with prejudice of a substantially similar application.¹⁹ The language of the new subsection (a) is hereby

¹² AMTA Comments at 2.

¹³ *NPRM*, 17 FCC Rcd at 5629 ¶ 3 (citing *Salter*, 6 FCC 2d at 814 ¶ 10).

¹⁴ *NPRM*, 17 FCC Rcd at 5630 ¶ 3.

¹⁵ See *Salter*, 6 FCC 2d at 814 ¶ 10.

¹⁶ *Id.*

¹⁷ Lorain Community Broadcasting Co., *Memorandum Opinion and Order*, 5 FCC 2d 55, 57 ¶ 6 (1966).

¹⁸ *NPRM*, 17 FCC Rcd at 5630 ¶ 5.

¹⁹ We do not expand the language of Section 1.937 to prohibit applications repeating renewal applications that were dismissed without prejudice, as this would bar a licensee whose renewal application was dismissed as late-filed, see 47 C.F.R. § 1.949(a), from seeking a new license to replace the expired license.

amended to reflect its applicability to all types of license applications, and applies equally to all actions including dismissals with prejudice, denials and revocations. Likewise, subsection (c) will be amended to include dismissed with prejudice applications. Finally, we believe that the rule as proposed to be modified sufficiently distinguishes applications dismissed without prejudice from those either dismissed with prejudice or denied, thus addressing AMTA's concern. We therefore conclude, for the above stated reasons, that it is in the public interest to modify Section 1.973 of the Commission's Rules as set forth in the Appendix to this *Report and Order*.

7. We also believe that Sections 1.937(a) and (b) can be streamlined into a single, simplified paragraph. Both sections generally prohibit repetitious applications. Both forbid repetitious applications upon the dismissal with prejudice of a substantially similar application. Furthermore, although hearings are only mentioned in Section 1.937(b), both sections are applicable to denials after the applicant has been afforded an opportunity for a hearing, because Section 1.937(a) covers license revocations, which are only possible after an opportunity for a hearing.²⁰ Thus, we conclude that Sections (a) and (b) are sufficiently similar to combine into a single paragraph.

IV. CONCLUSION

8. As there is no opposition to the proposed rule changes to Section 1.937, and the proposed changes will clarify the Commission's prohibition against filing repetitious applications within twelve months of the denial or dismissal with prejudice of a substantially similar application, we find the proposed amendments to be in furtherance of the public interest. We also find it significant that such rule change will streamline the Commission's Rules. Accordingly, we hereby adopt the changes as reflected in the Appendix to this *Report and Order*.

V. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

9. The Commission, pursuant to 5 U.S.C. § 605(b) certifies that the rule will not have a significant economic impact on a substantial number of small entities.²¹ The purpose of this *Report and Order* is to prohibit the filing of applications for radio station licenses within twelve months of the denial of a substantially similar application. This change is made to promote the most efficient use of the Commission's resources by preventing the immediate filing of repetitious applications. We have analyzed the information submitted during the comment period and the proposed rule change does not impose any additional compliance burden on small entities regulated by the Commission. Accordingly, we certify, pursuant to Section 605(b) of the Regulatory Flexibility Act (RFA), that the rule change established in this *Report and Order* will not have a significant economic impact upon a substantial number of small entities, as that term is defined by the RFA. The Commission's Office of Public Affairs, Reference Operations Division, shall send a copy of this *Report and Order*, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the RFA. We shall also publish a copy of this certification in the Federal Register.

B. Paperwork Reduction Act

10. This *Report and Order* does not contain either a proposed or modified information collection.

C. Ordering Clauses

²⁰ See 47 C.F.R. §§ 1.91, 1.92.

²¹ 5 U.S.C. § 605(b).

11. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 403, this *Report and Order* IS HEREBY ADOPTED.

12. IT IS FURTHER ORDERED that the rules set forth in the Appendix WILL BECOME EFFECTIVE 30 DAYS after publication in the Federal Register.

13. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order* including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Further Information

14. For further information concerning the rulemaking proceeding contact Peter Waltonen, Esq., at (202) 418-0097 or TTY (202) 418-7233, pwaltone@fcc.gov, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division.

15. Alternative formats (computer diskette, large print, audiocassette and Braille) are available to persons with disabilities by contacting Jenifer Simpson at (202) 418-0008, TTY (202) 418-2555. This *Report and Order* can also be downloaded at: <http://wireless.fcc.gov/releases.html#orders>.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**APPENDIX
FINAL RULE**

Chapter I of Title 47 of the Code of Federal Regulations, Part 1, is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Section 1.937 is amended by removing and reserving paragraph (b) and revising paragraphs (a) and (c) to read as follows:

§ 1.937 Repetitious or conflicting applications.

(a) Where the Commission has, for any reason, dismissed with prejudice or denied any license application in the Wireless Radio Services, or revoked any such license, the Commission will not consider a like or new application involving service of the same kind to substantially the same area by substantially the same applicant, its successor or assignee, or on behalf of or for the benefit of the original parties in interest, until after the lapse of 12 months from the effective date of final Commission action.

(b) [Reserved.]

(c) If an appeal has been taken from the action of the Commission dismissing with prejudice or denying any application in the Wireless Radio Services, or if the application is subsequently designated for hearing, a like application for service of the same type to the same area, in whole or in part, filed by that applicant or by its successor or assignee, or on behalf or for the benefit of the parties in interest to the original application, will not be considered until the final disposition of such appeal.

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