

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 96-320

In re Applications of)
)
MILLARD V. OAKLEY)
)
and)
)
RONALD H. HYDER)
)
For Nationwide Commercial Private Land)
Mobile Licenses in the 220-222 MHz Band)

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 1996

Released: August 30, 1996

By the Commission:

1. The Commission has before it for consideration two Applications for Review filed on July 6, 1993, by Millard V. Oakley ("Oakley") and Ronald H. Hyder ("Hyder"), respectively. Oakley and Hyder seek review and reversal of staff actions dismissing their above-captioned applications for failure to timely provide information required by the Commission's Rules. Also before the Commission is an opposition to Hyder's Application for Review, filed April 28, 1994, jointly by Kingdon R. Hughes, Jean M. Warren, and Global Cellular Communications, Inc., and a consolidated response thereto, filed May 10, 1994 by Hyder. For the following reasons, we hereby deny the subject applications for review and affirm the staff actions dismissing the Oakley and Hyder applications.

Background

2. On March 14, 1991, the Commission adopted rules and procedures initiating the introduction of local and nationwide, commercial and noncommercial, land mobile service in the 220-222 MHz band. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, 6 FCC Rcd 2356 (1991) ("Report and Order"), modified, 7 FCC Rcd 4484 (1992). Among the rules adopted in the Report and Order was 47 C.F.R. § 90.713, which established entry criteria for licensees proposing nationwide (commercial and noncommercial) service.

3. The Commission acknowledged in the Report and Order that the Office of Management and Budget ("OMB") had not yet approved the information collection requirements contemplated by § 90.713. Accordingly, the Report and Order announced:

For this reason, we will initially permit the filing of applications for nationwide systems in the 220-222 MHz band without the information specified in Section 90.713. At such time as OMB approves collection of this [entry criteria] information, we will ask those with pending applications for nationwide systems to provide it. At such time as Section 90.713 of the rules has become effective and OMB has approved the related collection of information, all applicants for nationwide systems from that point must include the information.

6 FCC Rcd at 2372, ¶ 130 (footnote omitted).

The Report and Order advised that further information about filing procedures would be announced in a subsequent Public Notice. 6 FCC Rcd at 2375, n. 118. The Report and Order also stated that the Commission would begin accepting applications for the 200-222 MHz band on or after the second day after publication of a summary of the Report and Order in the Federal Register and that § 90.713 would become effective 90 days after publication in the Federal Register. 6 FCC Rcd at 2372-2373, ¶¶ 131-132. A summary of the Report and Order was properly published in the Federal Register on April 29, 1991,¹ and the Commission began accepting applications for land mobile service in the 220-222 MHz band on May 1, 1991. Oakley and Hyder filed their respective applications for nationwide commercial land mobile licenses shortly thereafter.

4. On June 18, 1992, in response to petitions for reconsideration of the Report and Order, the Commission, among other things, modified § 90.713 of its Rules. See Memorandum Opinion and Order, 7 FCC Rcd 4484 (1992). Additionally, having received OMB approval, the Commission established a deadline of November 19, 1992, by which applicants for nationwide land mobile service in the 220-222 MHz band would be required to file amendments providing the information required by § 90.713. 7 FCC Rcd at 4494. A summary of the Memorandum Opinion and Order was published in the Federal Register on July 22, 1992. See 57 Fed. Reg. 32448. The summary referenced the filing deadline for noncommercial applicants, but not for commercial applicants. Subsequently, on October 1, 1992, the Private Radio Bureau (predecessor to the Wireless Telecommunications Bureau) released a Public Notice (DA 92-1321) and adopted an Order, 7 FCC Rcd 6591 (PRB 1992), relating to applicants for nationwide land mobile service in the 220-222 MHz band. The Public Notice reminded commercial applicants of the November 19, 1992, deadline and explicitly admonished that a failure to timely provide the information required by § 90.713 would constitute a fatal deficiency resulting in automatic dismissal. The Public Notice was published in the Federal Register on November 2, 1992. See 57 Fed. Reg. 49475. The

¹ 56 Fed. Reg. 19598

Order, although primarily concerned with noncommercial applicants, also referenced the November 19, 1992, deadline applicable to commercial applicants. The Order was published in the Federal Register on October 22, 1992. See 57 Fed. Reg. 48191.

5. Neither Oakley nor Hyder amended his application to provide the information required by § 90.713 by the November 19, 1992, deadline. Consequently, by separate actions taken in February 1993, the Commission's staff dismissed the Oakley and Hyder applications. Both applicants timely filed petitions for reconsideration, and, during the pendency of those petitions for reconsideration, on March 31, 1993, the Commission conducted its scheduled lottery to select from among competing applicants for nationwide commercial licenses in the 220-222 MHz band. The Commission staff subsequently denied the Oakley and Hyder petitions for reconsideration on June 3, 1993. The subject applications for review followed.

6. Oakley and Hyder advance essentially the same arguments in their applications for review as they did in their petitions for reconsideration. First, Oakley and Hyder claim that they were not afforded adequate notice of the November 19, 1992, deadline because the Commission's Public Notice announcing the date was not published in the Federal Register at least 30 days prior to the deadline. Additionally, Oakley and Hyder maintain that their applications for nationwide commercial land mobile licenses were improperly dismissed because the Commission failed to comply with the OMB requirements relating to the Paperwork Reduction Act of 1980.

7. In their joint opposition, Kingdon R. Hughes, Jean M. Warren, and Global Cellular Communications, Inc. collectively assert that (a) Hyder lacks standing to seek review of the dismissal of his application; (b) Hyder violated the Commission *ex parte* rules by failing to serve them with copies of his Application for Review; (c) the Commission did afford adequate notice of the November 19, 1992, deadline; and (d) the Commission did comply with OMB requirements relating to the Paperwork Reduction Act of 1980. Hughes, Warren, Global urge the Commission to consider the merits of their otherwise late-filed opposition because they remained unaware until March 1994 that Hyder had filed an Application for Review in this matter, and a successful appeal by Hyder would effectively invalidate the March 31, 1993, lottery in which they were awarded licenses. Under the circumstances, we will consider the merits of their joint opposition.²

² We hereby reject the assertion that Hyder lacks standing to contest the dismissal of his application. The dismissal of his application constitutes an administrative action to which Hyder has a right of appeal. Because we find on the facts discussed herein that Hyder's request for relief should be denied, we need not consider the other procedural argument advanced by Hughes, Warren, and Global.

Discussion

8. The Administrative Procedure Act ("APA") governs the circumstances under which an agency must provide notice to the public of its actions in the Federal Register. Specifically, § 552 of the APA requires the Commission to separately state and currently publish in the Federal Register "rules of procedure[;] substantive rules of general applicability[;] statements of general policy or interpretations of general applicability formulated and adopted by the agency[; and] each amendment, revision, or repeal of the foregoing." 5 U.S.C. § 552(a)(1)(C), (D), and (E). In the case of a substantive rule, § 553 of the APA requires publication in the Federal Register not less than 30 days before the effective date of the rule. 5 U.S.C. § 553(d). The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency" 5 U.S.C. § 551(4).

9. In the instant case, the APA required the Commission to publish in the Federal Register a notice of the adoption of § 90.713 not less than 30-days prior to the effective date of the new rule section, and the Commission published such a notice in the Federal Register on April 29, 1991, 90-days before the rule became effective. Therefore, it is clear that the Commission complied with and exceeded the requirements of the APA in this instance. Accordingly, there is no merit to the claim that the Commission denied Hyder and Oakley fair notice of the new rule section.

10. Similarly, there is no merit to the argument that APA required the Commission to provide at least 30-days advance notice in the Federal Register of the November 19, 1992, amendment deadline. Hyder and Oakley apparently confuse the *effective date* of § 90.713, for which advance publication in the Federal Register is required, with the *amendment deadline*, for which there is no such advance publication requirement. The November 19, 1992, deadline was not a "substantive rule," as that term is defined by the APA. Indeed, the deadline did not create or otherwise impose upon applicants any substantive information-gathering obligations beyond those already specified in § 90.713. The deadline simply established a date by which applicants would be required to amend their applications to provide information required by a rule section about which they had already been afforded more than adequate notice. In this regard, it is well established that the purpose of the 30-day advance notice requirement in § 553 of the APA is to "afford persons affected a reasonable time to prepare for the effective date of a rule or rules or to take any other action which the issuance of the rules may prompt." Daniel International Corp. v. Occupational Safety and Health Review Commission, 656 F.2d 925, 931 (4th Cir. 1981), citing APA Legislative History, 79th Cong. 2d Sess. 201 (1946). In the instant case, Oakley and Hyder were afforded more than a year *after* the rule section became effective to prepare themselves for and submit the information required by § 90.713. Moreover, the Commission: (a) placed applicants on notice in the Report and Order that it intended to provide further information about the amendment deadline; (b) provided such information in a Public Notice issued on October 1, 1992; and (c) published the Public Notice in the Federal Register on November 2,

1992. Thus, even assuming, arguendo, that the deadline constituted a "procedural rule," publication in the Federal Register on November 2, 1992, of the Commission's Public Notice announcing the deadline, would have been sufficient to satisfy the APA.

11. We also find no merit to the related argument advanced by Oakley and Hyder that commercial applicants somehow received inadequate notice or were confused because *noncommercial* applicants were alerted to the deadline further in advance than were their commercial counterparts. As shown above, the Commission fully complied with the APA by publishing timely notice to *all applicants* of the then-newly adopted substantive rule section (§ 90.713) in the Federal Register. Furthermore, neither Oakley nor Hyder has demonstrated that the APA required advance Federal Register notice of the deadline in addition to advance Federal Register notice of the effective date of the rule section, or that either lacked *actual* knowledge of the Commission's October 1, 1992, Public Notice announcing the deadline.

12. In the final analysis, neither the adoption nor the implementation of § 90.713 precipitated confusion warranting reversal of the staff action below. Whatever the reason that Oakley and Hyder missed the amendment deadline, it was not because of a failure by the Commission to afford them adequate notice, as required by the APA. Accordingly, the dismissal of their respective applications was entirely proper. See Salzer v. FCC, 778 F.2d 869 (D.C. Cir. 1985).

13. Oakley and Hyder next argue that the Commission failed to obtain OMB approval and to display a "control number" assigned by OMB prior to requiring compliance with § 90.713. There is no merit to these claims relating to the Commission's compliance with the Paperwork Reduction Act ("PRA") which, pursuant to § 3512 of the PRA, requires an agency information collection request to display a current control number assigned by OMB. In the instant case, contrary to Oakley's and Hyder's assertions, OMB approved the information collection provisions of § 90.713 on July 24, 1991, at which time it assigned the control number 3060-0475. This control number was properly displayed at § 0.408 of the October 1, 1991, edition of the Commission's Rules, more than a year before the November 19, 1992, filing date.

Conclusions

14. Based on the foregoing, we find no basis for disturbing the staff decisions dismissing the Oakley and Hyder applications. The Commission fully complied with the APA as well as the PRA in enacting and implementing § 90.713 of its rules.

15. ACCORDINGLY, pursuant to § 5 of the Communications Act of 1934, as amended, 47 U.S.C. § 155, IT IS ORDERED, that the Application for Review, filed July 6, 1993, by Millard V. Oakley IS DENIED.

16. IT IS FURTHER ORDERED, that the Application for Review, filed July 6, 1993, by Ronald H. Hyder IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary