

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

In the matter of)
)
Revisions to Broadcast Auxiliary Service Rules in)
Part 74 and Conforming Technical Rules for)
Broadcast Auxiliary Service, Cable Television Relay) ET Docket No. 01-75
Service and Fixed Services in Parts 74, 78 and 101 of)
the Commission's Rules)

ORDER

Adopted: April 21, 2004

Released: May 4, 2004

By the Commission:

1. By this Order, we deny the application for review (Application)¹ filed by the Society of Broadcast Engineers, Inc. (SBE) responding to the denial of its request for a second stay of the rules for coordination of fixed aural and video stations in the Broadcast Auxiliary Service (BAS) adopted in the *Report and Order* in this proceeding.² We affirm the Office of Engineering and Technology's (OET) *Order (Denial Order)*³ denying SBE's request (Second Request) seeking an additional six-month stay of the effective date of those rules.⁴ We agree with OET's determination that an additional stay of the BAS coordination rules is not in the public interest, and affirm that these rules are effective as of October 16, 2003.

Background

2. In the *Report and Order*, the Commission adopted coordination procedures for fixed Aural BAS stations operating on frequencies above 944 MHz and fixed Television BAS (BAS) stations operating on frequencies above 2110 MHz under Part 74 of the rules.⁵ The Commission adopted these procedures to conform the coordination procedures for fixed BAS, and Cable Television Relay Service (CARS) under Parts 74 and 78, with those already in effect for Fixed Microwave Services (FS) under Section 101.103(d) of the rules. It found that the FS procedures were appropriate for fixed BAS and CARS, stating that uniform procedures for bands shared among these services are necessary to promote spectrum efficiency

¹ Society of Broadcast Engineers, Inc., Application for Review of Denial of Stay Extension, ET Docket No. 01-75 filed Oct 27, 2003 (Application).

² *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission's Rules, Report and Order* in ET Docket No. 01-75, 17 FCC Rcd 22979 (2002) (*Report and Order*).

³ *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission's Rules, Order* in ET Docket No. 01-75, 18 FCC Rcd 21134 (2003) (*Denial Order*).

⁴ Society of Broadcast Engineers, Inc., Request for Extension of Temporary Stay, Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission's Rules, ET Docket No. 01-75, filed Oct. 1, 2003 (Second Request).

⁵ See *Report and Order* ¶¶ 53-65 and at Appendix A: Final Rules, §§ 74.502(d) and 74.638. In the *Report and Order*, the Commission also adopted the new coordination requirement for fixed stations in the Cable Television Relay Service (CARS) under Part 78. See *Report and Order* at Appendix A: Final Rules, § 78.36.

and to minimize the possibility of harmful interference.⁶ Because these procedures were already in effect for Aural and TV BAS stations in the bands 6425-6525 MHz and 17700-19700 MHz, the new rules only affected fixed BAS in the bands 944-952 MHz (950 MHz), 2450-2583.5 MHz (2.5 GHz), 6875-7125 MHz (7 GHz), and 12700-13250 MHz (13 GHz).

3. In its initial Request for Temporary Stay (Initial Request), SBE requested a one-year stay to allow BAS licensees time to correct inaccurate receive site information on the FCC's licensing database, *i.e.*, the Universal Licensing System (ULS), noting that these errors are a legacy of licensing schemes previous to the ULS and occur in 29% of all fixed point-to-point BAS license records.⁷ SBE further noted that receive site information was not required prior to 1974 and that it remains missing on many old licenses.⁸ SBE explained that, compared to the informal coordination procedures then in effect, the new, more formal coordination procedures require a more accurate database. SBE acknowledged that the Commission in prior public notices warned broadcasters to examine and correct inaccuracies in the ULS, via informal correction procedures, but stated that with the adoption of formal coordination procedures, BAS licensees would have a greater incentive to ensure that their license records are up to date.⁹

4. On April 15, 2003, OET issued an Order (*Stay Order*) granting SBE's Initial Request to stay the coordination rules, but only for six months, agreeing with SBE that legacy database inaccuracies in the ULS could affect the efficacy of the coordination procedures, and that these inaccuracies were not anticipated when the *Report and Order* setting these procedures was adopted.¹⁰ OET concluded that a six-month period was a proper balance to provide BAS licensees and Commission staff sufficient time to address completion and correction of legacy database inaccuracies without unnecessarily delaying the efficiency and protection benefits offered by the new coordination procedures.¹¹ OET also found that SBE had demonstrated that, absent a stay, BAS licensees might suffer harm because of an increased likelihood of interference to their receive facilities. Therefore, OET granted the *Stay Order* on delegated authority, delaying the effective date of the new coordination rules until October 16, 2003.¹²

5. During the six-month stay, SBE requested a blanket waiver of application fees for BAS applications filed to provide information missing from the ULS, in order to encourage the filing of such applications.¹³ On September 3, 2003, the FCC's Office of Managing Director (OMD) dismissed SBE's request for relief and denied the request for waiver, stating that the Commission may only consider such requests filed by individual applicants pertaining to their own applications in accordance with

⁶ *Id.* ¶¶ 2, 53, 61.

⁷ See Society of Broadcast Engineers, Inc., Request for Temporary Stay of the PCN Requirement, Revision of the Broadcast Auxiliary Service, ET Docket No. 01-75, Digital Modulation for all TV BAS Bands, RM-9418, and Low-Power Video Assist Devices, RM-9856, filed Apr. 4, 2003, at 2 (Initial Request).

⁸ *Id.* at 1-2.

⁹ *Id.* at 5; see also "Wireless Telecommunications Bureau Makes Broadcast Auxiliary Radio Station License Databases Available for Review prior to ULS Implementation," *Public Notice*, May 7, 1999.

¹⁰ See *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission's Rules*, Order in ET Docket No. 01-75, 18 FCC Rcd 7032 (2002), ¶ 4 (*Stay Order*).

¹¹ *Id.* ¶ 6.

¹² *Id.* ¶¶ 1, 8.

¹³ See SBE Letter, Emergency Request for Waiver of Filing Fees for Certain Broadcast Auxiliary Modification Applications Submitted on Form 601, dated and filed Jun. 2, 2003.

Section 1.1117, and, moreover, that SBE had not established good cause for a waiver of application fees.¹⁴

6. SBE sought a further stay of the Commission rules on October 1, 2003. In its Second Request, SBE generally reiterated the reasons set forth in its Initial Request and argued for an additional six-month stay.¹⁵ SBE provided updated figures suggesting that approximately 50% of fixed stations in the 7 GHz and 13 GHz bands do not have receive site coordinates listed in the ULS.¹⁶ SBE noted that many BAS licensees had waited for a determination of the outcome of its fee waiver request before filing applications to provide the receive site information.¹⁷ SBE stated that it had publicized the September 3, 2003, denial of the waiver request and had taken more aggressive steps to urge BAS licensees to complete and correct the license record for their facilities, but that the initial six-month stay had proven insufficient. SBE requested the additional six months as a “final opportunity” for BAS licensees to supply the information.¹⁸ The National Spectrum Managers Association (NSMA), in its Opposition to the Request for Extension of Temporary Stay (Opposition), opposed an additional stay, asserting that the institution of new coordination procedures would best satisfy SBE’s concerns about appropriate interference analysis, whereas delay would not address or satisfy SBE’s concerns about database completeness and accuracy.¹⁹ NSMA argued that the opportunity for response in the coordination process would most effectively generate interaction and data sharing and address SBE’s concerns.²⁰ NSMA conceded that the database inaccuracies could lead to inaccurate interference analysis before the notification is initiated, but emphasized that the bilateral process would address the possibility of missing or inaccurate BAS path information.²¹ SBE, in its Reply to the Opposition, asserted that NSMA’s experience with the more accurate databases used by the FS under Part 101 was not relevant in evaluating the additional time needed to address deficiencies with Aural and TV BAS information in the ULS. SBE objected to NSMA’s suggestion that the coordination under the new rules could proceed by relying on responses from broadcasters contacted to address potential missing or inaccurate BAS information as suggested by

¹⁴ See 47 C.F.R. § 1.1117; see also OMD Letter, Emergency Request for Waiver of Filing Fees for Certain Broadcast Auxiliary Modification Applications Submitted on Form 601, Fee Control No. 0000RROG-03-086, dated Sep. 3, 2003, at 3 (OMD Letter).

¹⁵ See Second Request at 1-4.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ See NSMA, Opposition to the Request for Extension of Temporary Stay, filed Oct. 9, 2003, at 2 (NSMA Opposition to Second Stay).

²⁰ See NSMA Opposition to Second Stay at 3-5. Under the coordination rules, in engineering a system, an applicant must, by appropriate studies and analyses, select sites, transmitters, antennas, and frequencies that will avoid interference in excess of permissible levels to other users. All parties must cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum. Coordination involves two separate elements: 1) notification by the applicant, to all licensees and other applicants whose facilities could affect or be affected by the proposed facilities, of the relevant technical details of the proposed facilities, and 2) response by affected parties within 30 days, with the provisions that: a) responses indicating potential interference must specify the technical details in writing, b) all parties must make every reasonable effort to eliminate all technical problems and conflicts, and c) if no response is received within the 30 day period, the applicant will be deemed to have made reasonable efforts to coordinate and may file its application. Further, all technical problems that come to light during coordination must be resolved unless a statement is included with the application regarding the conflict. See 47 C.F.R. §§ 101.103(d), 74.502(d), 74.638(b), 78.36(d).

²¹ For example, NSMA argued that coordinators could notify broadcasters in a given geographic area to account for any BAS facilities not already accounted for in an initial analysis.

NSMA.²² However, SBE stated in its reply that it would be reasonable to proceed with the new coordination rules if, after an additional six months, the database was still inaccurate.

7. OET applied the Commission's four-part test for evaluating stay requests and issued its *Denial Order* denying SBE's Second Request for stay, finding it was not warranted, and ordering that the coordination rules would go into effect on October 16, 2003.²³ In applying the four-part test, OET considered whether: the stay would likely succeed on its merits; irreparable harm would be suffered if a stay was not granted; other interested parties would be harmed if the stay were granted; and the public interest would favor granting of the stay. OET concluded that while the database concerns raised again by SBE might remain a concern, there was no indication that additional time would cure these issues. OET noted that licensees had already had nearly one year since the rules were first adopted and released until the expiration of the first stay. Moreover, OET noted that licensees had six weeks from notice of the waiver denial to the end of the stay to file or correct information for the ULS. OET concluded that the database issues would not seriously affect the efficacy of the coordination process and harm licensees subject to these rules. Finally, OET found that further delay in the application of the coordination procedures would not be in the public interest, because it would unnecessarily delay the efficiency and protection benefits offered by these procedures

Discussion

8. We deny SBE's request to review and reverse the *Denial Order*, because any remaining concerns to resolve database inaccuracies do not warrant further delay of the benefit of the rules. In this application for review, SBE urges review of the *Denial Order*, arguing that a further stay of the coordination rules is warranted because, contrary to OET's conclusions in the *Denial Order*, an additional six-month extension would cure existing database issues, and prior coordination under the adopted rules cannot proceed until the database inaccuracies are corrected. SBE, while acknowledging that licensees were not required to wait for the resolution of the request for a blanket waiver of application fees for BAS applications, argues that licensees' delay in complying with the *Report and Order* until the resolution of the fee waiver request on September 3, 2003 was reasonable. SBE also argues that although OET pointed out in its *Denial Order* that the coordination rules adopted in the *Report and Order* were released to the public on November 13, 2002, the rules were not published in the Federal Register until March 17, 2003. Finally, SBE argues that the Commission cannot conclude that there is any benefit or efficiency to be gained from letting the coordination rules take effect under the present circumstances. No comments were filed in response to the application for review.

9. We disagree with SBE and, thus, deny its Application to reverse the *Denial Order*. Commission rules require that applications for review concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law and which of the five factors identified by the rules warrant Commission consideration.²⁴ SBE asserts that OET made various erroneous factual conclusions. However, we find no "erroneous finding as to any important or material

²² See SBE, Reply to Opposition to the Request for Extension of Temporary Stay, filed Oct. 8, 2003, at 2-3 (SBE Reply for Second Stay).

²³ See *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977) (requiring petition likely to prevail on the merits; will suffer irreparable harm if a stay is not granted; other interested parties will not be harmed if the stay is granted; and the public interest favors grant of the stay).

²⁴ See 47 C.F.R. §§ 1.115(b)(1), (b)(2)(i)-(v). Section 1.115(b)(2) requires a petitioner support why the application for review warrants Commission review based on one of the following factors: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; (ii) The action involves a question of law or policy which has not previously been resolved by the Commission; (iii) The action involves application of a precedent or policy which should be overturned or revised; (iv) An erroneous finding as to an important or material question of fact; (v) Prejudicial procedural error. 47 C.F.R. §§ 1.115 (b)(2)(i)-(v).

question of fact,” or other factor that warrants review.²⁵ We agree with the substantive conclusions of OET stated in the *Denial Order*, and find that OET correctly determined that granting SBE’s Second Request for stay was not warranted.²⁶ OET correctly concluded that the request was not likely to prevail on the merits; that irreparable harm was not likely to result if the stay was denied; and that the public interest did not favor granting the stay, and it properly denied the request.²⁷

10. We believe that, while further improvements of the database are desirable, as raised by SBE in this Application, there is no indication that additional time would result in the resolution of the inaccuracies complained of, nor that a need is demonstrated by the likelihood of irreparable harm if these issues are not resolved prior to the coordination rules coming into effect. SBE acknowledges in its reply comments to its Second Request that even if the Commission should grant additional time, there is a possibility database inaccuracies would remain unresolved. It further agrees that at some point the coordination rules should enter into effect, irrespective of any remaining database inaccuracies.²⁸ This admission is counter to SBE’s arguments that additional time would cure the remaining database inaccuracies. Further, SBE’s admission that the rules should go into effect even if the inaccuracies are not completely resolved (whether on October 16, 2003 or six months later) supports our conclusion that OET correctly found that the efficacy of the coordination rules need not be seriously impacted by possible database inaccuracies. Moreover, whereas OET found that the potential benefit of database corrections weighed favorably in the context of a brief delay in the implementation of our rules and an anticipated improvement in the database, we note that the grant of additional extensions would result in a lengthy period of time between the adoption and effectiveness of the new coordination procedures, with little apparent benefit to be derived, based on our experience with the last stay. Whereas OET may have considered the probable effect of the initial extension of time in a light most favorable to SBE, we are not obliged to do so, and activity during the six-month stay confirms that the case has not been made for any further delay.

11. SBE raises the issue of whether it was reasonable for licensees to wait on a determination of SBE’s blanket fee waiver request before addressing database inaccuracies. We find this concern is not material and does not warrant review of the *Denial Order*. OET correctly states that licensees were not barred from taking steps to address the database inaccuracies during the initial six-month stay until the fee waiver request was resolved, because if the fee waiver was granted their application fees would have been refunded. In any event, the grant or denial of the blanket fee waiver would not have cured the issues that were argued to support the Initial Request, or relieved licensees from the need to prepare their applications. Whether or not licensees’ application fees would have been refunded, those applications would presumably still have had to be prepared and filed to cure the database concerns. Moreover as OET indicated, even after the disposition of the blanket fee waiver, individual licensees could have filed their own requests for fee waivers, if a waiver of application fees was compelling.²⁹ It seems prudent and reasonable that licensees electing to wait would have prepared for filing in anticipation of the resolution of the waiver request, and filed during the six week window remaining between the September 3, 2003, determination of SBE’s fee waiver request and the last day of the stay, October 15, 2003. In fact, as OET notes, Commission records indicate the modest increase in the filing of applications for Aural and TV BAS modifications during the stay, possibly attributable to filings for completion and correction of receive site information, primarily occurred in the last month of the stay. We infer from this that even parties who waited prepared to file during the stay period, and in fact did complete filings to complete or

²⁵ See 47 C.F.R. § 1.115(b)(2)(iv). Commission rules require that applications for review must concisely and plainly state the questions presented and identify with particularity what factors warrant the Commission’s review. See 47 C.F.R. § 1.115(b).

²⁶ *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977).

²⁷ See *id.*; *Denial Order* at 5-6.

²⁸ See SBE reply comments to Second Request at 4, ¶ 7; see also text and accompanying note *supra* at 3, ¶ 6.

²⁹ 47 C.F.R. § 1.1117.

correct receive site information, and that our actions taken in this proceeding to address licensees' filings to database inaccuracies have been appropriate but do not warrant further delay.

12. Further, as discussed above, we agree with OET that the continued existence of incomplete and inaccurate records in the ULS, while undesirable, is not fatally detrimental to the efficacy of coordination procedures nor otherwise likely to result in irreparable harm due to interference to existing facilities, as stated in the *Stay Order*.³⁰ We agree with OET that coordination procedures using appropriate conservative default criteria, as discussed in the *Stay Order*,³¹ can proceed successfully even with incomplete or inaccurate database information. The procedures provide a practicable opportunity for all potentially affected parties to respond to the proposed coordination request to address missing or corrective information where needed, before the facilities are formally subject to an application. As the *Denial Order* clarified, consistent with the coordination requirement for full cooperation and reasonable effort among all parties in resolving potential conflicts, existing licensees have a responsibility to respond whenever a notification contains any omissions or errors regarding their facilities that could lead to potential interference.³² It will be the initiating party's responsibility to provide existing licensees with the complete information used to characterize the notified party's facilities for the engineering studies and analyses upon which the coordination is based.³³ Further, where data is missing or incorrect in the notification, and the complete or corrective data is brought to the initiating party's attention via response, it will be the initiating party's responsibility to conduct any engineering studies and analyses required to reassess the impact on the existing facilities, as newly documented, and reinitiate coordination, as needed.

13. Finally, in view of the above, we agree with OET that further delay in the application of the coordination procedures for Aural and TV BAS is not in the public interest, because it will unnecessarily delay the efficiency and protection benefits offered by these procedures. These new procedures afford all potentially affected existing licensees sufficient opportunity to respond to each proposal, and are sufficient to avert harmful interference to or from existing facilities. The effect of these rules will enable parties to identify complete and accurate information on existing facilities. Thus, while the initial stay was a reasonable response towards the goal of achieving a complete and accurate database, it now appears that further delay would not significantly advance that goal.

14. As the *Denial Order* discussed, under these coordination rules, licensees can be expected to act in their own self-interest to avoid interference. The coordination process provides an opportunity for a potentially affected licensee to respond or otherwise provide corrective information regarding the consideration of its facilities, or the effect of the applicant's new facilities on its facilities. However, in the absence of such a response, the applicant will be deemed to have made reasonable efforts to coordinate and may file the application.³⁴ We recognize that if the licensee's receive information in the database is incomplete or incorrect and the licensee fails to provide corrective information during coordination, there could result a grant of new facilities that could ultimately cause interference to an existing licensee. As indicated above, however, we believe that licensees will act in their own self-interest and ensure that the licensee's receive information in the database is complete and correct or provide complete and correct information in response to the applicant's notification.

15. We, therefore, also affirm the action taken in the *Denial Order* to encourage BAS licensees to file applications for minor modification where needed to complete receive site data that is missing in the

³⁰ See *Stay Order* ¶¶ 4, 6.

³¹ See *Stay Order* ¶7 (discussing interference criteria in Sections 74.638 and 101.105 as baseline for new interference criteria).

³² See 47 C.F.R. §§ 101.103(d), 74.502(d), 74.638(b), 78.36(d); see also *supra* note 19.

³³ The applicant may refer to available database information, where that provides the full basis for its analysis. Where that data underlying the analysis varies from the available database information, due to suspected omissions or variations, the applicant must advise the affected licensees of such variations.

³⁴ See 47 C.F.R. §§ 74.502(d), 74.638(b), 78.36(d)(2)(iv), 101.103(d)(2)(iv).

ULS. We will continue to allow the filing of such applications without frequency coordination, provided the application supplies only missing receive site data. Receive site data may include parameters such as site geographic coordinates, site elevation above mean sea level, and antenna height, beamwidth, gain, manufacturer, and model number. Further, the application must include a showing demonstrating that the station was licensed at a time when receive site information was not required, or documenting that the information now missing was previously licensed or provided under application to the FCC.³⁵ The information provided must also be consistent with any data already in the database, such as transmit azimuth or receive site data.³⁶ The filing of receive site information without coordination, where it is missing under circumstances as described above, is appropriate and will continue to be permitted.

Ordering Clause

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 303(c), 303(f), 303(g), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), 303(r) and 309(j), that the Society of Broadcast Engineers' Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁵ We note that the FCC previously provided an opportunity for BAS licensees to correct database information before BAS licensing on the ULS was initiated. See "Wireless Telecommunications Bureau Makes Broadcast Auxiliary Radio Station License Databases Available for Review prior to ULS Implementation", *Public Notice*, May 7, 1999. Only facilities licensed on the basis of an application filed before August 30, 1999, the date on which processing of Aural and TV BAS applications was initiated on ULS, may now take advantage of this opportunity to provide ULS receive site data without undergoing frequency coordination. See "Wireless Telecommunications Bureau to Begin Use of Universal Licensing System (ULS) For Microwave Services on August 30, 1999", *Public Notice*, DA 99-1543, August 6, 1999.

³⁶ For example, any modification to transmit azimuth required as a result of providing receive site geographic coordinates will not be eligible for relief from coordination and, if the change exceeds one degree, will require evidence of frequency coordination. Calculation of transmit azimuth may be checked on-line at <http://wireless.fcc.gov/cgi-bin/utilities/accudist.pl>. See 47 C.F.R. §§ 1.929(d), 101.103(d), 74.502(d), 74.638(b), 78.36. See also *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, Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476 (1999) ¶¶ 15-16 (*ULS Reconsideration Order*).