In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re	)	
	)	
Mobile Relay Associates,	)	No. 05–1258
	)	
Petitioner	)	
	)	

OPPOSITION OF THE
FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR A WRIT OF MANDAMUS

Mobile Relay Associates (MRA) seeks a writ of mandamus to compel the Federal Communications Commission (Commission) to take action in a total of sixteen licensing proceedings in which MRA is either (1) the applicant or licensee or (2) a party contesting the application or license of a third party. MRA, however, has failed to make the necessary showing that it is entitled to extraordinary relief. MRA has not provided any basis for concluding that the agency's delay is unreasonable or has caused actual harm to MRA's interests. Nor has MRA identified any other consideration that would support its attempt to compel the Commission to prioritize completion of MRA's licensing proceedings over the agency's more pressing matters. MRA's petition for a writ of mandamus therefore should be denied.

BACKGROUND

The licensing proceedings at issue in this case involve the "Industrial/ Business Pool"—spectrum allocated by the Commission in 47 C.F.R. § 90.31 *et seq.* for two-way radio communications by businesses and other entities. In this case, MRA seeks a writ of mandamus covering twenty applications or licenses in sixteen separate licensing proceedings. In nine of those proceedings (those listed in Exhibit A–1 of MRA's mandamus petition), MRA

is contesting a license application filed by a third party or is seeking to modify a third party's license. In the other seven proceedings (those listed in Exhibit A–2 of MRA's mandamus petition), MRA is the applicant or licensee.

With respect to the nine Exhibit A–1 proceedings, only one (associated with File No. 0000693489) involves a pending application.[1] There, MRA is opposing an application filed by National Science and Technology Network, Inc. (NSTN) for a new license. Although Exhibit A–1 also lists File No. 0000544347 as a pending application, the Public Safety and Critical Infrastructure Division (PSCID) of the Commission's Wireless Telecommunications Bureau, the component of the agency responsible for issuing licenses in the Industrial/Business Pool, granted that application in part and denied it in part in 2004. *See National Science and Technology Network*, 19 FCC Rcd 23134 (PSCID 2004). According to Exhibit A–1, NSTN has filed an application for review (which MRA opposes) with the full Commission challenging the denial, but MRA has not asked the agency to review the partial grant of NSTN's application. The remaining seven proceedings listed in Exhibit A–1 concern MRA's request that the Commission modify or rescind various licenses granted to NSTN, Licensed Communications Services, Inc., or Thomas Kurian.[2]

Exhibit A–2 to MRA's mandamus petition lists seven proceedings in

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[1] The Commission refers to granted licenses in the Industrial/Business Pool (including those referred to herein) by the associated station's call sign: a series of letters and numbers that begin with the letter "W"(*e.g.*, WQBH275). The Commission refers to applications for licenses by a unique 10-digit file number (*e.g.*, File No. 0000693489).

[2] Kurian is a former licensee of Station WPSI886. The current licensee is Kevin R. Nida. For consistency with MRA's mandamus petition, we will refer to Kurian as the licensee in this response.

which MRA is the applicant or the licensee. Of these seven proceedings, MRA has authority to operate on four of the licenses in question. Exhibit A–2 correctly notes that the Commission has issued authorizations to MRA in three of those proceedings (those associated with Stations WQBZ908, WIL251, and WPPF233).[3] In addition, on July 26, 2005, after Exhibit A–2 was filed, the Commission granted MRA's application in File No. 0001985104. *See* Att. C hereto. MRA therefore may put this license into use as well. The three other licensing proceedings listed in Exhibit A–2 (associated with File Nos. 0001996438, 0001995876, and 0001799643) remain pending.

ARGUMENT

The Commission is "entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987). This Court will intervene only where "the agency's delay is so egregious as to warrant mandamus." *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) (*TRAC*). In *TRAC*, the Court set forth a list of considerations for evaluating whether that high bar has been cleared:

> (1) the time agencies take to make decisions must be governed by a rule of reason;
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

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[3] Although NSTN filed petitions against these authorization, the Commission denied NSTN's petition concerning Station WIL251 on July 29, 2005, *see* Att. A hereto, and denied its petition concerning Station WPPF233 on August 29, 2005, *see* Att. B hereto. NSTN's petition for reconsideration concerning Station WQBZ908 is still pending, but that authorization is in effect, and the license is available for MRA's use.

> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted).

"[T]hose invoking the court's mandamus jurisdiction must have a 'clear and indisputable' right to relief; and even if the [petitioner] overcomes all these hurdles, whether mandamus relief should issue is discretionary." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc). Here, MRA has failed to provide any basis for concluding that this is "one of the exceptionally rare cases" in which the extraordinary relief of mandamus is warranted. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 76 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991).

1. MRA is not entitled to a writ of mandamus because it has failed to show that the agency's delay has been unreasonable, much less so egregious as to warrant extraordinary relief. *TRAC*, 750 F.2d at 79. In each of the nine proceedings listed in Exhibit A–1 of MRA's mandamus petition, *i.e.*, proceedings in which MRA is contesting the applications or licenses of third parties, MRA has filed a pleading of some sort within the last twenty months. Moreover, seven of those proceedings have been pending for less than two years. *See* MRA Pet. Exh. A–1.[4] In the two proceedings that have been

[4] Those seven proceedings are those involving: File No. 0000544347 and Stations WQBH275, WPMP751, WPPZ334, WPME699, WPSI886, and WPQF492.

pending for a longer period, MRA has augmented the record during the pendency of the proceedings. In the proceeding involving Station WPLY766 *et al.*, MRA filed an erratum to its fourth supplement to its modification request in June 2004. *Id.* In the other proceeding (associated with File No. 0000693489), MRA's last filing occurred in April 2005. *Id.*

MRA's claims of unreasonable delay are even weaker with respect to the licensing proceedings listed in Exhibit A–2 of its mandamus petition, *i.e.*, those in which MRA is the applicant or licensee. The Commission already has *granted* MRA the authorizations that it requested in four of those proceedings (*i.e.,* those involving Stations WQBZ908, WIL251, WPPF233, and File No. 0001985104). In addition, the Commission already has denied NSTN's petitions against the authorizations associated with Stations WIL251 and WPPF233. *See* Atts. A & B hereto.[5] Although NSTN's reconsideration petition against WQBZ908 remains pending, that license is currently in effect and may be put into use. Moreover, none of the unresolved licensing proceedings listed in Exhibit A–2 has been pending for an unreasonable period of time. NSTN's reconsideration petition concerning Station WQBZ908 has been pending for less than ten months. Likewise, of the three contested license applications filed by MRA that remain pending, only one (involving File No. 0001799643) is slightly more than a year old, while the other two (involving File Nos. 0001996438 and 0001995876) were filed earlier

[5] On August 5, 2005, NSTN filed a informal petition asking the agency to reconsider the denial of its petition against Station WIL251. MRA does not contend that Commission action on that informal petition has been unreasonably delayed.

this year. *See* MRA Pet. Exh. A–2.[6]

MRA has not met its burden of showing that the delay in any of these sixteen contested licensing proceedings has been unreasonable. MRA's argument rests largely on its own unsubstantiated contention that its opponents' positions in these various proceedings are "without merit" and "even frivolous," and that the records in these proceedings "are not so complicated as to require lengthy scrutiny." *See* MRA Pet. 3. The majority of the proceedings at issue in MRA's mandamus petition, however, concern challenges that MRA itself has brought against licenses or license applications of third parties—challenges that MRA presumably believes have merit. In any event, no administrative agency could properly function if it were required to prioritize its caseload based on a claim by one of the parties that its particular case can be easily resolved.

Similarly, MRA's contention that the Commission has acted more quickly in another "similarly situated" licensing proceeding does not demonstrate unreasonable delay. MRA Pet. 3 (citing *Northern Indiana Public Service Company*, 20 FCC Rcd 2398 (PSCID 2005) (*NIPSCO*)). The requirement that agencies act without unreasonable delay does not mean that the Commission must process license applications on a "first-come, first-served" basis. To the contrary, "[t]his Court has upheld in the strongest terms the discretion of

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[6] MRA asserts (at 2) that the dates listed in its own chart "may understate the amount of time the proceeding has been pending before the FCC." However, "[t]he party seeking mandamus has the burden of showing that its right to issuance of the writ is clear and indisputable." *In re International Union, United Mine Workers of Am.*, 231 F.3d 51, 54 (D.C. Cir. 2000) (internal quotation marks omitted). MRA's inscrutable suggestion that there may be other unspecified dates relevant to its request for a writ of mandamus is insufficient to carry that burden.

regulatory agencies to control the disposition of their caseload." *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1986) (internal quotation marks omitted); *see also* 47 U.S.C. § 154(j) (authorizing the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

In any event, MRA's contention that *NIPSCO* is "similarly situated" to the Kurian proceeding involving the license of Station WPSI886 is not accurate. In *NIPSCO*, there is no indication that the requested modification was contested. *See* 20 FCC Rcd at 2398–99 ¶¶ 3–5, 2401 ¶ 9. In contrast, according to MRA's own chart, Kurian has strongly opposed MRA's request to modify the license for Station WPSI886. *See* MRA Pet. Exh. A–1, at 2. Kurian and MRA combined have submitted ten separate pleadings in that proceeding, including, as MRA observes (at 4), an engineering analysis filed by Kurian that purports to contest MRA's claims of potential interference. MRA's unsupported assertion (*id.*) that Kurian's engineering analysis is "frivolous" does not make that proceeding "similarly situated" with *NIPSCO*.

2. MRA also has failed to make the necessary showing that it has suffered the type or extent of harm that would warrant the issuance of a writ of mandamus. Two proceedings that MRA lists in Exhibit A–1 of its mandamus petition (involving File Nos. 0000693489 and 0000544347) concern NSTN's applications for new licenses. Because MRA opposes grant of those licenses, any agency delay in those proceedings would not harm MRA's interests. Similarly, the Commission has *granted* authorizations to MRA in four of the seven proceedings listed in Exhibit A–2 to MRA's mandamus petition. Because MRA is able to put those licenses to use, it has no basis for

suggesting that it has been injured by agency delay in those cases.[7]

With respect to the remaining proceedings at issue here, MRA makes no claim that "human health and welfare are at stake," *TRAC*, 750 F.2d at 80, nor does it maintain that it has experienced harmful interference. Instead, MRA alleges that "defective frequency coordination" has "rais[ed] issues of *potential* harmful interference." MRA Pet. 2–3 (emphasis added). MRA also states (at 4) that it has experienced "tremendous limitations" on its ability to modify its licenses, which has "impede[d] its ability to provide adequate service." But MRA does not support its assertion with any information of specific harm that would enable the Court to conclude that MRA has demonstrated a "clear and indisputable" right to mandamus. *In re International Union, United Mine Workers of Am.*, 231 F.3d at 54.

MRA asserts (at 4–5) that agency delay has allowed its opponents to "continue making meritless or frivolous submissions," which has increased MRA's litigation costs and "undermine[d]" the Commission's "credibility." MRA correctly observes, however, that it would be inappropriate for the Court in a mandamus action to "decide the merits of any of the issues before the Commission." MRA Pet. 6. Any alleged harm that is based on the strength or weakness of MRA's opponents' positions is not an injury that can justify the issuance of extraordinary relief.

3. It is well settled that the Commission has "broad discretion to set its

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[7] MRA contends (at 4) that "the continued pendency of meritless protests directed to MRA's own licenses and filings puts a cloud upon MRA's operations." MRA, however, does not provide any detail on the nature or extent of this "cloud" or explain how it harms MRA in a way that would justify compelling the agency to expedite the processing of its applications over the many other contested licensing proceedings before the Commission.

agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler*, 818 F.2d at 896. In the last year, PSCID alone processed over 37,000 license applications. Although many license proceedings are uncontested, a significant number (such as the proceedings at issue here) involve disputed legal or technical issues that require individualized attention from agency staff. At the present time, for instance, more than 200 contested licensing-related matters pending before PSCID will require significant staff resources to resolve.[8]

In addition to the Commission's day-to-day licensing work, the agency has been heavily involved in a variety of important proceedings that have consumed substantial staff time and resources during the periods at issue in this case. For instance, on August 6, 2004, the Commission, addressing what then-Chairman Powell described as "one of the most complex matters to come before the Commission," issued a 252-page decision that sets forth a detailed spectrum-reconfiguration plan for mitigating the interference that public-safety communications systems in the 800 MHz band have increasingly experienced over the last few years. *See Improving Public Safety in the 800*

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[8] The number of pending matters varies on a day-to-day basis, as new cases are filed and case decisions are made. The number of cases cited does not include requests for waiver of various Commission rules (*e.g.*, requests for waiver of the rules requiring wireless handsets to be compatible with devices used by hearing-impaired individuals, *see* 47 C.F.R. § 20.19(c) and Hearing Aid Compatibility Act of 1988, Pub. L. No. 100–394, 102 Stat. 976 (1988)). The number also does not include requests for waiver of rules requiring wireless carriers employing a handset-based wireless E–911 Phase II location solution to achieve a 95 percent penetration among their subscribers of location-capable handsets by December 31, 2005. *See* 47 C.F.R. § 20.18(g)(1)(v) and ENHANCE 911 Act of 2004, Pub. L. No. 108–494, § 107, 118 Stat. 3986, 3991 (2004) (Enhance 911 Act)); *see also*, *infra*, pp.10–11.

MHz Band, 19 FCC Rcd 14969, 15221 (2004) (*800 MHz Public Safety Order*), *pets. for review pending*, *Mobile Relay Associates v. FCC*, No. 04–1413 (D.C. Cir.).[9] In addition, on January 7, 2005, the Commission released a decision addressing a host of technical standards in the 700 MHz public-safety band. *See The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communication Requirements Through the Year 2010*, 20 FCC Rcd 831 (2005).

The agency has other pressing spectrum-related responsibilities as well. For instance, on December 17, 2004, Congress enacted the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, 118 Stat. 3638. Section 7502(a) of that Act requires the Commission, "in consultation with the Secretary of Homeland Security and the National Telecommunications and Information Administration, [to] conduct a study to assess short-term and long-term needs for allocations of additional portions of the electromagnetic spectrum for Federal, State, and local emergency response providers" and to report its findings to Congress by December 17, 2005—a date that is less than two months away. 118 Stat. 3855–56. Relatedly, on December 23, 2004, Congress enacted the ENHANCE 911 Act, 118 Stat. 3986. Section 107 of that statute requires the Commission to take action on certain requests for waivers of specified enhanced 911 requirements within 100 days

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[9] The Commission has since that time released two substantial follow-on decisions in the *800 MHz Public Safety* proceeding. *See* 19 FCC Rcd 25120 (rel. Dec. 22, 2004); FCC 05–174, WT Docket No. 02–55 (rel. Oct. 5, 2005). PSCID also has issued several decisions in the same proceeding during this period, including an order responding to a motion filed by MRA for a partial stay of the *800 MHz Public Safety Order*. *See* 20 FCC Rcd 641 (rel. Jan. 14, 2005).

of the filing of such requests. 118 Stat. 3991. PSCID is the component of the agency principally responsible for each of the matters discussed above.[10] In light of these competing responsibilities, MRA's assertion (at 7 n.6) that there is now "no other Commission activity of an equal or higher importance" to the proceedings listed in its mandamus petition "that would be negatively impacted" by the issuance of a writ of mandamus is incomprehensible.

In sum, "accelerating the processing of the FCC proceedings at issue here" (*see* MRA Pet. 7 n.6) would require the Commission to divert agency resources from "agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80. In these circumstances, and particularly given the absence of any demonstration that the other *TRAC* factors support MRA's petition, there is no basis for the Court to conclude that MRA has carried its burden of demonstrating a "clear and indisputable" right to a writ of mandamus. *In re Cheney*, 406 F.3d at 729.

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[10] There are, of course, many other rulemaking and adjudicatory proceedings not subject to statutory deadlines (including contested licensing proceedings like the ones at issue here) that also require the attention of PSCID and other agency staff.

CONCLUSION

For all of the above reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

Daniel M. Armstrong
Associate General Counsel

Nandan M. Joshi
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418–1740

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