

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

In the Matter of)	
)	
BROWNING FERRIS INDUSTRIES, INC.)	
)	File No. D118162
Request for Waiver and Application for)	
Reinstatement of License for 800 MHz)	
Conventional Industrial/Land Transportation)	
Radio Service Station KRJ257, Walnut Creek,)	
California)	

ORDER

Adopted: May 26, 2000

Released: May 30, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* On September 14, 1999, Browning Ferris Industries, Inc. (BFI) resubmitted the above-captioned application,¹ which the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) had returned to BFI on June 30, 1999.² The Branch also denied BFI's request for a waiver of Section 90.149(a) of the Commission's Rules, to permit reinstatement of a prior authorization more than thirty days after the license expired.³ BFI now seeks reconsideration of that decision. For the reasons discussed below, we affirm the Branch's action and deny BFI's request.

2. *Background.* On July 9, 1996, BFI and Piombo Construction (Piombo) applied for

¹ See Letter from Robert J. Keller, counsel for BFI, to Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (filed Sept. 14, 1999) (Petition).

² Application Return Notice, FCC Form 1034G (June 30, 1999) (Return Notice).

³ 47 C.F.R. § 90.149(a) (1998). Section 90.149(a) provided that an application for reinstatement of an expired license must be filed within thirty (30) days after license expiration. *Id.* After BFI filed its request, Section 90.149(a) was superseded by Section 1.949(a) requiring renewals to be filed prior to the expiration date of the license. 47 C.F.R. § 1.949(a); see Biennial Regulatory Review –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, 21071-21074 ¶¶ 96-101 (1998). On reconsideration, however, the Commission stated that a renewal application in any wireless service would be granted *nunc pro tunc* if filed within 30 days of the license expiration date and otherwise sufficient under the rules; while applicants who file renewal applications more than 30 days after license expiration may also request renewal *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review and may be accompanied by enforcement action. 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, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11485 ¶¶ 20-22 (1999) (*ULS MO&O*).

consent to assign the license for Station KRJ257, Walnut Creek, California, operating on frequency 807/852.9625 MHz, from Piombo to BFI.⁴ The assignment application was granted on January 21, 1997, and a station license issued to BFI, with an expiration date of September 2, 1997.⁵ BFI states that the employee who received the license was new and unfamiliar with Commission procedures, and did not realize that it was an assigned license with only a partial term remaining rather than a new license with a full five-year term.⁶ Consequently, BFI did not timely file for renewal of the station license, which canceled automatically on September 2, 1997,⁷ and was purged from the Commission's licensing data base on December 10, 1997. On September 30, 1998, Nextel of California, Inc., dba Nextel Communications (Nextel), applied for an authorization to use the channel formerly associated with Station KRJ257.⁸ On December 4, 1998, BFI filed a reinstatement application and requested a waiver of the requirement that reinstatement applications be filed within thirty days of the expiration date.

3. On June 30, 1999, the Branch returned the application to BFI for correction of certain defects in its application pertaining to its proposed technical parameters and also denied BFI's waiver request. In this connection, the Branch stated that filing a timely renewal application is the licensee's responsibility, and indicated that a waiver was not warranted because another party had applied for the frequency at issue and BFI had not shown why it could not use other frequencies.⁹ When BFI resubmitted the application on September 14, 1999, to cure the defects, it requested reconsideration of the denial of its waiver request.¹⁰

4. *Discussion.* BFI requests a rule waiver that would permit reinstatement of its license for Station KRJ257, even though the reinstatement of license application was not filed within the 30-day time period specified in the Commission's Rules. Under the Part 90 rules in effect when BFI submitted its reinstatement application, grant of a waiver required a showing that the purpose of the rule would not be served or would be frustrated by application to the instant case, that unique circumstances were involved, and that there were no reasonable alternative solutions within the existing rules.¹¹ For the reasons set forth below, we conclude that the Branch correctly denied BFI's waiver request.

5. BFI argues that the present circumstances justify a waiver because the employee handling licensing matters, who was new on the job and not familiar with the Commission's licensing

⁴ FCC File No. D044075, filed July 9, 1996.

⁵ An assigned license retains the expiration date of the existing authorization. See, e.g., *Assessment and Collection of Regulatory Fees for Fiscal Year 1999, Notice of Proposed Rulemaking*, MD Docket No. 98-200, 14 FCC Rcd 5918, 5962 ¶ 3 (1999); *Implementation of Section 9 of the Communications Act, Report and Order*, MD Docket No. 94-19, 9 FCC Rcd 5333, 5356 ¶ 68 (1994).

⁶ Petition at 2; Exhibit No. 1 to Form 600, filed December 4, 1998, at 1 (Waiver Request).

⁷ 47 C.F.R. § 90.149(b) (1997).

⁸ FCC File No. C018733, filed September 30, 1998. That application was granted on November 4, 1999, under Call Sign WPPK774.

⁹ Return Notice at 2-3.

¹⁰ Petition at 2.

¹¹ 47 C.F.R. § 90.151(a) (1998) (now 47 C.F.R. § 1.925(b)(3)).

procedures, could have assumed that the expiration date on the license referred to the construction period and commencement of operations deadline rather than the expiration of the authorization.¹² We find this argument unconvincing. It is well established that any applicant who either ignores or fails to understand clear and valid rules of the Commission with respect to application requirements runs the risk that the application will not be acceptable for filing.¹³ Thus, it was BFI's responsibility to file an application for license renewal or license reinstatement within the time periods specified in the Commission's Rules.¹⁴ We do not believe that a licensee's failure to note the expiration date on its license alone justifies a waiver of the reinstatement rules.¹⁵

6. In addition, BFI also argues that it has no reasonable alternative solution because "the general channel congestion in areas like San Francisco makes i[t] virtually impossible to obtain an alternative frequency" for its operations.¹⁶ We note, however, that except for that conclusory statement, BFI has not submitted any data showing that no other frequency is available to meet its communications needs. BFI further notes that it has made a substantial investment in its communication system in the 800 MHz band.¹⁷ The fact that an alternative frequency would cause BFI to incur additional equipment costs is not, in and of itself, a sufficient ground for granting the requested waiver.¹⁸ Thus, we find that BFI has not demonstrated a lack of reasonable alternatives.

7. We also note that subsequent to the expiration of the license for Station KRJ257 at Walnut Creek, California, Nextel applied for and was granted an authorization to use the channel formerly associated with that station. Thus, it appears that co-channel interference would occur if BFI's license for KRJ257 were reinstated as requested.¹⁹

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.925, that the petition for reconsideration filed by Browning Ferris, Industries, Inc., on December 4, 1998, and resubmitted on September 14, 1999, IS DENIED.

9. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.949 of the Commission's Rules, 47

¹² Petition at 2.

¹³ See *Ranger v. FCC*, 294 F.2d 240, 242 (D.C. Cir. 1961); see also, e.g., *Burlington Cablevision, Inc., Order on Reconsideration*, 13 FCC Rcd 772, 777 ¶ 12 (MMB Video Servs. Div. 1998).

¹⁴ *ULS MO&O*, 14 FCC Rcd at 11154 ¶ 21; Daniel R. Goodman, Receiver, Dr. Robert Chan, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21944, 21972 ¶ 53 (1998).

¹⁵ See, e.g., *Duke Power Co., Order*, DA 99-2574, ¶ 8 (WTB PSPWD rel. Nov. 18, 1999).

¹⁶ Petition at 2.

¹⁷ *Id.*

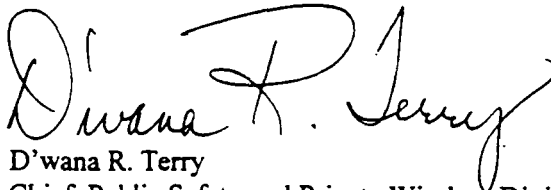
¹⁸ See, e.g., *Country Cousins, Inc., Order*, DA 99-2540, ¶ 6 (WTB PSPWD rel. Nov. 16, 1999).

¹⁹ See 47 C.F.R. § 1.934(e)(2) (application may be dismissed if requested spectrum cannot be assigned without causing harmful interference).

C.F.R. § 1.949, that the reinstatement application FCC File No. D118162, filed by Browning Ferris Industries, Inc., on December 4, 1998, and resubmitted on September 14, 1999, IS DISMISSED.

10. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "D'wana R. Terry". The signature is fluid and cursive, with the first name "D'wana" and last name "Terry" clearly distinguishable.

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau