

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

In the Matter of
FRESNO CITY AND COUNTY
HOUSING AUTHORITIES
For Public Safety/Special
Emergency Radio Service -
Conventional Station WXC764,
Fresno, California
FCC File No. 516647

ORDER ON RECONSIDERATION

Adopted: June 15, 2000

Released: June 19, 2000

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

I. INTRODUCTION

1. On February 2, 1999, the Licensing and Technical Analysis Branch (Branch) of the Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Bureau), denied the reinstatement petition of the Fresno City and County Housing Authorities (Fresno). Fresno requests reconsideration of the Branch denial, and waiver of Section 90.149 of the Commission's Rules to effect reinstatement of Fresno's license for Public Safety/Special Emergency Radio Service - Conventional Station WXC764. For reasons stated below, we deny Fresno's Petition for Reconsideration and Waiver.

II. BACKGROUND

2. Fresno manages and maintains public housing in various locations throughout the Fresno metropolitan area. Using federal funding, Fresno maintains clean, habitable housing for those who could not otherwise afford it. Due to a ministerial error, Fresno allowed its authorization to operate Public Safety/Special Emergency Radio Service Station WXC764 to expire on April 8, 1998. Consequently, on

1Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Michael Higgs, Brown and Schwaninger (Feb. 2, 1999) (Shultz Letter).

2Fresno Petition for Reconsideration and Waiver of the Commission's Rules at 1 (filed Mar. 2, 1999) (Petition for Reconsideration and Waiver).

3Id.

4Id. at 2.

5Fresno Petition for Reinstatement at 2 (filed Aug. 18, 1998) (Reinstatement Petition); see also Shultz Letter at 1.

August 5, 1998, the Branch purged the license from the Commission's database.<sup>6</sup> On August 18, 1998, Fresno requested that the license be reinstated.<sup>7</sup>

3. On February 2, 1999, the Branch denied Fresno's request.<sup>8</sup> The Branch's rationale for its denial was: 1) the fact that the Bureau had suspended the acceptance of new applications for General Category frequencies;<sup>9</sup> 2) Fresno's failure to request a rule waiver;<sup>10</sup> and 3) Fresno's failure to provide sufficient justification for reinstatement.<sup>11</sup> On March 2, 1999, Fresno filed its Petition for Reconsideration and Waiver.

### III. DISCUSSION

4. The Commission's Rules, as in effect when Fresno requested reinstatement of its license, provided that licensees for stations authorized under Part 90 of the Commission's Rules had an additional thirty days after the expiration of the license term to apply for reinstatement of expired licenses.<sup>12</sup> If no timely application for reinstatement was filed, the authorization was deemed to have expired on the date specified on the authorization.<sup>13</sup> In addition, under these rules, an application to reinstate a license that was expired for more than thirty days was treated as a request for a new frequency assignment.<sup>14</sup>

5. Because an untimely reinstatement application was deemed a new application to obtain Commission authorization for use of the frequencies, and the Bureau has suspended acceptance of new applications for General Category frequencies, Fresno's license for Station WXC764 cannot be reinstated absent a waiver of the Commission's Rules. Accordingly, Fresno has requested a waiver of the Commission's license renewal/reinstatement rules. As a matter of policy, the Commission strives to adhere strictly to application filing deadlines and to grant waivers of its rules only in unusual or compelling circumstances.<sup>15</sup> With respect to license renewals, the Commission has stated that the licensee is fully responsible for knowing the term of its license and filing a timely renewal application.<sup>16</sup>

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<sup>6</sup>Shultz Letter at 1.

<sup>7</sup>Reinstatement Petition at 1.

<sup>8</sup>Shultz Letter at 2.

<sup>9</sup>*Id.* 1-2 (citing Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands, *Order*, 10 FCC Rcd 13190 ¶¶ 3, 5 (WTB 1995)).

<sup>10</sup>Shultz Letter at 2.

<sup>11</sup>*Id.* Fresno's request did not include a showing that unique circumstances were involved and that there were no reasonable solutions within existing rules. *Id.*

<sup>12</sup>47 C.F.R. §§ 90.127(b), 90.149(a) (1998).

<sup>13</sup>47 C.F.R. § 90.149(b) (1998).

<sup>14</sup>47 C.F.R. § 90.175 (1998); Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 ¶ 21 (1991) (*PLMR R&O*).

<sup>15</sup>*See, e.g.*, Lansingburg Central School District, *Order*, DA 99-2161, ¶ 4 (CCB rel. Oct. 12, 1999) (citing FCC Overrules Caldwell Television Associates, Ltd., *Public Notice*, 58 Rad. Reg. 2d (P & F) 1706, 1707 (rel. Oct 4, 1984)); Industrial Communications & Electronics, Inc., *Order on Reconsideration*, 13 FCC Rcd 8417, 8422 ¶ 13 (WTB CWD 1998).

6. We may grant a request for waiver when a) the underlying purpose of the rule(s) would not be served by application to the instant case, and a grant of the requested waiver would be in the public interest; or b) in view of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>17</sup> Fresno argues that grant of a waiver would be in the public interest, and denial would leave it with no reasonable alternative.<sup>18</sup> As discussed in further detail below, however, we conclude that grant of the requested waiver is not warranted.

7. First, Fresno argues that grant of a waiver would serve the public interest because it would enable Fresno to serve and protect public housing residents and workers.<sup>19</sup> Fresno states that it uses its radios “when responding to emergencies, supervising refuse collection and removal and when conducting property maintenance and other essential activities.”<sup>20</sup> According to Fresno, absent adequate radio communications capability, it will not be able to maintain the federally-mandated standard of living for the public housing under its control, and the health, safety, and general welfare of those relying on it for their housing needs would be adversely affected if its license for Station WXC764 is not reinstated.<sup>21</sup> Fresno also asserts that it uses its radios to ensure the safety of its workers.<sup>22</sup> According to Fresno, given the crime and safety problems endemic to any low-income housing areas, if we do not reinstate its license for Station WXC764, the workers who respond to emergencies and perform all of the other functions essential to well-run housing would be forced either to put their lives and safety at risk on an ongoing basis, or not respond to the needs of the residents they serve.<sup>23</sup>

8. We disagree. Fresno has not adequately set out the purported connection between its license for Station WXC764 and the health and safety of its residents and employees. Other than an unexplained reference to “emergencies,” the record shows only that Fresno uses its radio system to facilitate trash pick-up and other routine maintenance associated with the properties under its control.<sup>24</sup> Moreover, Fresno fails to present evidence as to why it cannot use either other frequencies or other means of communication to address its responsibilities. In addition, our licensing database indicates that the City and County of Fresno and their agencies are licensed to operate more than 90 private land mobile radio stations, and Fresno has not suggested that none of these systems has any excess capacity that it

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<sup>16</sup>*PLMR R&O*, 6 FCC Rcd at 7301 n.41; 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 98-20, 14 FCC Rcd 11476, 11485 ¶ 21 (1999).

<sup>17</sup>47 C.F.R. § 1.925(b)(3).

<sup>18</sup>Petition for Reconsideration and Waiver at 3-4.

<sup>19</sup>*Id.* at 3.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

<sup>23</sup>*Id.*

<sup>24</sup>It does not appear, for example, that the petitioner is responsible for fire or police protection in its housing projects.

could share.<sup>25</sup> We do not believe, therefore, that Fresno has justified a waiver of the Commission's Rules. As the Commission stated, regarding the arguments of another licensee seeking to retain its license despite having failed to file a timely renewal or reinstatement application, Fresno "[i]n effect, . . . seeks to be excused from its failure to renew its original license, based on the benefit its use of that spectrum will confer on the public. We have rejected similar arguments in the past, and we do so now."<sup>26</sup>

9. Next, Fresno contends that reinstatement of its license would be affirmatively in the public interest, as there are no hardships on third parties against which to balance the public's gain.<sup>27</sup> Specifically, Fresno argues that, given that the Bureau has suspended acceptance of applications for this frequency pending a future spectrum auction, if its Petition for Reconsideration and Waiver is denied, the frequencies at issue will lie fallow for at least two years.<sup>28</sup> We conclude, however, that Fresno has not met its burden of establishing that the public interest in not allowing a channel temporarily to lie fallow<sup>29</sup> outweighs the public interest in maintaining the fairness of the application process and treating applicants equally.<sup>30</sup> We have found in other cases that the fact that spectrum has been identified for auction and is not currently being licensed does not warrant a waiver to permit reinstatement.<sup>31</sup>

10. Finally, Fresno argues that it has no reasonable alternative solution. It states that the Branch's suggestion that Fresno use another frequency is not reasonable because Fresno cannot identify any other frequency on which its existing radio equipment, purchased at public expense, could be used.<sup>32</sup> Fresno also asserts that it has no budget for replacing its existing equipment or for subscribing to any commercial carrier's radio communications service.<sup>33</sup> Fresno argues that even if it had a budget for subscribing to a commercial carrier's radio communication service, such subscription would not be an efficient use of the taxpayer's money as the going rate for two-way radio service in the Fresno metropolitan area is in excess of \$30 per mobile unit per month.<sup>34</sup>

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<sup>25</sup>See 47 C.F.R. § 90.179.

<sup>26</sup>Application of Waste Management, Collection & Recycling, Inc., *Memorandum Opinion and Order*, FCC 99-134, ¶ 12 (rel. June 21, 1999) (*Waste Management*).

<sup>27</sup>Petition for Reconsideration and Waiver at 4.

<sup>28</sup>*Id.*

<sup>29</sup>See, e.g., Amendment of Section 73.202(b), Table of Assignments, FM Broadcast Stations, *Report and Order*, 62 FCC 2d 76, 80 ¶ 12 (1976).

<sup>30</sup>*Waste Management*, FCC 99-134, ¶ 12 (citing, e.g., *Consolidated Nine, Inc., v. FCC*, 403 F.2d 585, 595 (D.C. Cir. 1968)).

<sup>31</sup>Tampa Electric Co., *Order*, 14 FCC Rcd 21344, 21347-48 ¶ 8 (WTB PSPWD 1999); Duke Power Co., *Order*, 14 FCC Rcd 19431, 19434 ¶ 7 (WTB PSPWD 1999). Moreover, we note that the General Category auction will begin on August 16, 2000. See Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service in the General Category Band (851-854 MHz) and Upper Band (861-865 MHz), *Public Notice*, DA 00-1100 (WTB rel. May 18, 2000).

<sup>32</sup>Petition for Reconsideration at 3-4.

<sup>33</sup>*Id.* at 4.

<sup>34</sup>*Id.*

11. We disagree. First, we remind Fresno that, under Section 1.925(b)(3)(ii) of the Commission's Rules, a showing of unique or unusual circumstances is a prerequisite to obtaining a waiver based on a lack of reasonable alternatives.<sup>35</sup> Fresno has not claimed or demonstrated any such circumstances, and, as we have held before, "[w]e do not believe that an inadvertent failure to renew a license in a timely manner is so unique or unusual to warrant a waiver of the rules."<sup>36</sup> Moreover, we note that Fresno fails to demonstrate that the incursion of additional equipment or subscription costs is so unduly burdensome as to be contrary to the public interest. It has presented no evidence regarding how much a new system would cost, or for how many mobile units it would need to obtain service. We have determined in another context that replacing existing equipment is not *per se* an unreasonable alternative.<sup>37</sup> Therefore, a waiver is not warranted under the instant circumstances.

#### IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.3 and 1.106 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.106, the Request for Reconsideration and Waiver, filed on March 2, 1999, by Fresno City and County Housing Authorities **IS DENIED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>35</sup>See 47 C.F.R. § 1.925(b)(3)(ii).

<sup>36</sup>Plumas-Sierra Rural Electric Cooperative, *Order*, DA 00-628, ¶ 9 (WTB PSPWD rel. Mar. 22, 2000).

<sup>37</sup>See, e.g., Country Cousins, Inc., *Order*, 14 FCC Rcd 19351, 19353 ¶ 6 (WTB PSPWD 1999).