

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

In re Application of)	
)	
E.A. JOHNSTON, JR.)	File No. D033964
)	
Application to Modify)	
Phase I 220 MHz Station WPCC473)	
Fort Pierce, Florida)	

ORDER

Adopted: February 3, 2000

Released: February 4, 2000

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. By this Order, we address the petition for reconsideration filed by E.A. Johnston, Jr. (Johnston) on November 4, 1996, requesting reconsideration of the denial of a waiver of the Commission's rules to permit Johnston to modify his non-nationwide Phase I 220 MHz system, call sign WPCC473, in Fort Pierce, Florida. For the reasons discussed below, we reverse the decision, grant Johnston's waiver request, and order his modification application be processed.

2. On May 1, 1996, Johnston filed an application to relocate his non-nationwide Phase I 220 MHz system, pursuant to section 90.753(a) of the Commission's rules.¹ Concurrent with the application, Johnston filed a request for waiver of section 90.753 and included an engineering analysis demonstrating that his proposed station provides at least 10 dB of protection to the 38 dBμ contour of the nearest co-channel 220 MHz licensee, Ann Con Partners at call sign WPDA947.

3. On October 4, 1996, the former Land Mobile Branch (Branch)² denied Johnston's waiver request and dismissed Johnston's modification application for failure to comply with section 90.753(e) of the Commission's rules.³ Section 90.753(e) permits a non-nationwide Phase I 220 MHz licensee to relocate its base station more than one-half the distance over 120 kilometers toward any co-channel licensee's initially authorized base station if the proposed station is at least 120 kilometers from the co-channel licensee's initially authorized base station and the request is accompanied by a letter of consent from the co-channel licensee.⁴ Among other things, the Branch noted that Johnston's request for a waiver

¹ 47 C.F.R. § 90.753(a) (permits a non-nationwide Phase I 220 MHz licensee to relocate its base station one-half of the distance over 120 kilometers toward any co-channel licensee's authorized base station up to 8 kilometers).

² Since Johnston's filing, the former Land Mobile Branch of the Licensing Division of the Wireless Telecommunications Bureau was reorganized into the Licensing and Technical Analysis Branch of the Commercial Wireless Division of the Wireless Telecommunications Bureau.

³ Letter dated October 4, 1996, from Michael J. Regiec, Deputy Chief, Land Mobile Branch, to Lloyd W. Coward, Esq., counsel for Johnston (*Denial Letter*). See 47 C.F.R. § 90.753(e).

⁴ 47 C.F.R. § 90.753(e).

did not include a letter of consent from Ann Con Partners for Station WPDA947, nor any explanation why consent was not obtained.⁵ Due to the failure to provide the consent letter or to explain why one was not available, the Branch concluded that a waiver of section 90.753(e) of the Commission's rules was not appropriate.⁶

4. In his petition for reconsideration, Johnston asserts that the Commission's rules do not require a licensee to explain its attempts to obtaining co-channel consent and its efforts to relocate to a site which complies with the Commission's rules.⁷ Johnston claims that he was "clearly unable to obtain either: (i) a letter of consent from the co-channel licensee or (ii) access to a site in compliance with the rules."⁸ In support of these assertions, Johnston included a declaration of the system manager who stated that he attempted to contact Ann Con Partners by telephone and also contacted at least ten site managers to find a site that would have complied with the Commission's relocation rules.⁹ Johnston also provided a declaration from the tower site manager for the authorized site for Station WPDA947 that Ann Con Partners had not constructed a station at that site.¹⁰ Additionally, Johnston points out that waiver was necessary only because the proposed new location of his base station is .58 kilometers beyond the amount allowed under the rules.¹¹

5. While Johnston is correct that the 220 MHz modification rules did not specifically require a licensee to explain its attempts to obtain co-channel consent or its efforts to find a site that would comply with the rules, a request for waiver under Part 90 of the rules required a showing that unique circumstances were involved and that there was no reasonable alternative solution within existing rules.¹² Therefore, we find that the Branch was within its discretion to deny Johnston's waiver request. Nonetheless, we are persuaded that the unique circumstances involved in this situation overcome the need for Johnston to have explained why another site was not available. First, we note that Commission records indicate that the co-channel licensee, Ann Con Partners, failed to respond to a number of inquiries from the Commission regarding its construction status. Eventually, the license was revoked on October 17, 1997 for failure to construct. We think it would be inequitable to require Johnston to acquire a consent letter from a licensee that never responded to Commission inquires and never constructed. Second, we note that Johnston had provided an engineering study that demonstrated that Johnston's proposed

⁵ *Denial Letter.*

⁶ *Id.*

⁷ *See* Petition for Reconsideration filed by Johnston on November 4, 1996 (*Petition*) at 2.

⁸ *Petition* at 3.

⁹ *See* Exhibit 3 of *Petition.*

¹⁰ Declaration of Bruce R. McIntyre, Vice President/General Manager, Tower Technology Corporation of Tampa Bay, dated February 25, 1997.

¹¹ *See* Request for Expedited Consideration of Petition for Reconsideration filed by Johnston on May 28, 1998 (*Request*) at 4.

¹² 47 C.F.R. § 90.151(a) (1996). *See also* *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone Company, L.P., et al.*, 897 F.2d 1164 (D.C. Cir. 1990). Section 90.151 of the Commission's rules has since been removed in place of a general Part 1 waiver rule. *See* 47 C.F.R. § 1.925(b)(3).

relocation does not result in any interference to any other 220 MHz station. Finally, the *de minimis* nature of the distance between Johnston's proposed site and the maximum distance allowed under the 220 MHz modification rules is such that strict application of the rule is inequitable and contrary to the public interest.

6. Accordingly, pursuant to our authority under sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, IT IS ORDERED that the Petition for Reconsideration filed by E.A. Johnston on November 4, 1996, IS GRANTED and that his application for modification for Station WPCC473 be REINSTATED and PROCESSED.

7. This action is taken pursuant to delegated authority as set forth in section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION



William W. Kunze
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau