

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

In the Matter of the Application of
SIERRA PACIFIC POWER COMPANY
for Private Fixed Microwave Service Station
and Request for Waiver of Section 101.81
of the Commission's Rules
FCC File No. 750111

ORDER

Adopted: December 28, 2000

Released: January 3, 2001

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

I. INTRODUCTION

1. Sierra Pacific Power Company (Sierra Pacific) operates a fixed microwave service (FMS) station in the 2 GHz band and inadvertently allowed the license for the station to expire. As a result, Sierra Pacific filed an application for a new license for the same station. In connection with its application, Sierra Pacific requests a waiver of the Commission's rules that would otherwise result in the authorization of the station on a secondary basis. For the reasons set forth herein, we deny Sierra Pacific's waiver request.

II. BACKGROUND

2. The Commission reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services. To this end, the Commission has adopted certain transition rules. In doing so, the Commission balanced the needs of incumbent FMS

1Letter from James M. Mueller, Telecommunications Supervisor, Sierra Pacific Power Company, to Federal Communications Commission, dated June 18, 1999 (Waiver Request).

2FCC File No. 750111 (filed June 22, 1999 and amended December 10, 1999).

3See Waiver Request.

4Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (ET First Report and Order).

5See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public, and most conducive to the introduction of new services. Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886, 6886 ¶ 5 (1992) (ET First Report and Order).

licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.<sup>6</sup> Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.<sup>7</sup> ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.<sup>8</sup> In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.<sup>9</sup> Most minor modifications of FMS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the ET licensee.<sup>10</sup> The result is that while incumbent FMS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status.

3. Sierra Pacific is engaged in the generation, transmission, and distribution of electrical energy for use by the general public<sup>11</sup> and is the primary supplier of electricity for northern Nevada.<sup>12</sup> To support its electrical operations, Sierra Pacific operates a point-to-point private radio station that provides voice and data communications for its operations in Elko, Nevada.<sup>13</sup> The station, formerly licensed as Station WNTS667, operates in the 2 GHz band<sup>14</sup> and was originally authorized with primary status.<sup>15</sup>

4. Due to administrative error, Sierra Pacific failed to renew the license for Station

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<sup>6</sup>*ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

<sup>7</sup>47 C.F.R. §§ 101.69(b), 101.79(a). *See also ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

<sup>8</sup>*See* 47 C.F.R. §§ 101.69(a), 101.71-101.77

<sup>9</sup>47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis (*e.g.*, the new ET licensees) and they are not protected from interference from primary operations. *Cost Sharing and First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. *Id.*

<sup>10</sup>47 C.F.R. § 101.81.

<sup>11</sup>Letter from James M. Mueller, Telecommunications Supervisor, Sierra Pacific Power Company, to Federal Communications Commission, dated May 10, 1999 (May 10, 1999 Letter).

<sup>12</sup>Letter from Russ Buchanan, Telecommunications Engineer, Nevada Power Company, to Federal Communications Commission, dated May 12, 2000.

<sup>13</sup>May 10, 1999 Letter.

<sup>14</sup>*Id.*

<sup>15</sup>*See* Waiver Request.

WNTS667 in a timely manner,<sup>16</sup> and, thus, the license automatically expired on February 28, 1999.<sup>17</sup> By the time Sierra Pacific realized that the license had expired, the thirty-day grace period that the rules then allowed for reinstatement without relicensing had run.<sup>18</sup> Sierra Pacific then submitted a request to the Commission seeking authorization to operate the station under special temporary authority (STA),<sup>19</sup> which was granted on May 20, 1999.<sup>20</sup> On June 22, 1999, Sierra Pacific filed an application for a new license for its station, along with a request for waiver of the Commission's rules that provide that new FMS stations in the 2 GHz band will be authorized on a secondary basis to ET licensees.<sup>21</sup>

### III. DISCUSSION

5. In this case, while the station at issue was originally authorized with primary status, Sierra Pacific allowed its license to operate the station to expire. Sierra Pacific requests a waiver of the rules so that its new license for the station can be accorded primary status. We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>22</sup> For the reasons set forth below, we conclude that grant of the requested waiver is not warranted under the circumstances presented.

6. Sierra Pacific requests a waiver of the rule that would otherwise result in the authorization of the new station on a secondary basis on the grounds that it previously was licensed for the same spectrum until it inadvertently failed to renew the license.<sup>23</sup> We conclude that an inadvertent failure to renew a license in a timely manner does not constitute a unique or unusual circumstance that renders application of the 2 GHz licensing rules inequitable, unduly burdensome, contrary to the public interest, or leaves the applicant with no reasonable alternative.<sup>24</sup> As Sierra Pacific concedes,<sup>25</sup> each licensee bears the

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<sup>16</sup>Waiver Request.

<sup>17</sup>47 C.F.R. § 101.65(a) (1998) (currently codified at 47 C.F.R. § 1.955(a)(1)).

<sup>18</sup>Under the rules then in effect, petitions for reinstatement had to be filed within 30 days of the license's expiration date. 47 C.F.R. § 101.65(b) (1998).

<sup>19</sup>May 10, 1999 Letter.

<sup>20</sup>The STA subsequently was extended, and currently is effective through May 5, 2001.

<sup>21</sup>Waiver Request at 1.

<sup>22</sup>47 C.F.R. § 1.925(b)(3).

<sup>23</sup>Waiver Request at 1.

<sup>24</sup>See *Plumas-Sierra Rural Electric Cooperative*, Order, 15 FCC Rcd 5572, 5575 ¶ 9 (WTB PSPWD 2000) (*Plumas-Sierra*); *Duke Power Company*, Order, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999) (*Duke Power*).

<sup>25</sup>Waiver Request at 1.

exclusive responsibility of filing a timely renewal application.<sup>26</sup>

7. Further, we note that while Sierra Pacific does not contend that the underlying purpose of the rule would not be served or would be frustrated by applying it in this case, other 2 GHz band licensees in similar circumstances have made such arguments. Specifically, applicants that inadvertently failed to renew their old licenses argued that re-licensing the facilities on a primary basis would not frustrate the 2 GHz licensing rules because it would neither add “new” stations nor increase relocation costs beyond the level contemplated by the Commission when it reallocated the band.<sup>27</sup> We rejected that argument, and concluded that the purpose of the rules would in fact be frustrated by a waiver, because the 2 GHz rules are intended not only to ensure that the cost to relocate FMS incumbents does not escalate, but also to clear the 2 GHz spectrum by allowing FMS stations to lose primary status as those stations change.<sup>28</sup>

#### IV. CONCLUSION

8. Based on the record in this proceeding, we conclude that Sierra Pacific has failed to meet the requirements for a waiver of Section 101.81 of the Commission’s Rules. We therefore deny its request for a waiver of Section 101.81 of the Commission’s Rules. We note, however, that a denial of the waiver request does not mean that Sierra Pacific may not operate the subject station; rather, Sierra Pacific’s operation of such station will be accorded secondary status.

#### V. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.925, and 101.69 of the Commission’s Rules, 47 C.F.R. §§ 1.925, and 101.69, the Request for Waiver of Sierra-Pacific Power Company, filed June 22, 1999, IS DENIED.

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<sup>26</sup>See Biennial 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*, 14 FCC Rcd 11476, 11485 ¶ 21 (1999) (*ULS MO&O*); 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*, 6 FCC 7297, 7301 n.41 (1991). We note that subsequent to the filing of the above-captioned application, the Commission announced a new policy regarding licenses for which no timely renewal application is filed. Specifically, if a renewal application is late-filed up to 30 days after the license expiration date in any wireless service, and the application is otherwise sufficient under the Commission’s rules, the Commission will grant the renewal *nunc pro tunc*; applicants who file renewal applications more than thirty days after license expiration may also request renewal *nunc pro tunc*, but such requests will not be routinely granted, will be subjected to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures. *ULS MO&O*, 14 FCC Rcd at 11485-86 ¶ 22. Sierra Pacific’s current application was filed more than three months after the license expired. Given that Sierra Pacific bore the responsibility for timely renewing its licenses whether or not it received a renewal notice from the Commission, we conclude that reinstatement would not be appropriate under the circumstances presented herein. See *Plumas-Sierra*, 15 FCC Rcd at 5576 ¶ 9; *Duke Power*, 14 FCC Rcd at 19434-35 ¶ 8.

<sup>27</sup> See *Plumas-Sierra*, 15 FCC Rcd at 5574 ¶ 6; *Duke Power*, 14 FCC Rcd at 19433 ¶ 5.

<sup>28</sup> See *Plumas-Sierra*, 15 FCC Rcd at 5574-75 ¶ 7; *Duke Power*, 14 FCC Rcd at 19433-34 ¶ 6.

10. IT IS FURTHER ORDERED that application FCC File No. 750111 SHALL BE REFERRED to the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division for processing consistent with this *Order* and the applicable Commission Rules.

11. This action is taken under delegated 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