

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

In the Matter of)
)
FEDERAL EXPRESS CORPORATION) File No. D066388
)
Application for Five 900 MHz Business Category)
Channels in the Boston, Massachusetts area)
And Associated Request for)
Waiver of the Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2000

Released: February 25, 2000

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

I. INTRODUCTION

1. On January 11, 1999, Federal Express Corporation (FedEx) filed a Petition for Reconsideration¹ of the December 11, 1998 action by the Licensing and Technical Analysis Branch (Branch) of the Public Safety and Private Wireless Division dismissing the above-captioned application.² We deny the petition for the reasons set forth below.

II. BACKGROUND

2. FedEx was authorized, under Call Sign WNXJ987, to operate a trunked private land mobile radio (PLMR) system in the vicinity of Logan International Airport, Boston, Massachusetts, (Logan Airport) using five 900 MHz Business Category channels. The license for Call Sign WNXJ987 carried a five-year term that was scheduled to expire on September 25, 1996. FedEx states that it mailed a renewal application to the Commission on August 15, 1996,³

¹ See Petition for Reconsideration filed by Federal Express Corp. on January 11, 1999 (*Petition*). FedEx also filed a Motion to Stay the Branch action pending the outcome of its *Petition*. See Emergency Motion for Stay Pending Reconsideration filed by FedEx on December 31, 1998 (*Motion*). The *Motion* was opposed. See Opposition to Emergency Motion for Stay filed by Hub Folding Box, Fischbach & Moore, Perini Corp., and Industrial Communications & Electronics, Inc. on January 13, 1999. Because this *Memorandum Opinion and Order* resolves the *Petition*, we dismiss the *Motion* as moot.

² See Letter from Mary M. Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, to Pamela Gaary, Richard Rubin and Robert E. Stup, Jr., Ref. No. PS&PWD-LTAB-603 (Dec. 11, 1998) (*Branch Letter*).

³ *Petition* at 3.

but our licensing records do not reflect the receipt of any such application. Consequently, the license for Call Sign WNXJ987 was deemed to have expired as of September 26, 1996,⁴ and was deleted from the FCC's automated licensing database on December 13, 1996.⁵

3. FedEx states that it discovered the deletion of Call Sign WNXJ987 on December 19, 1996, and thereupon contacted the Chief of the Special Facilities Section of the Land Mobile Branch of the former Licensing Division⁶ and faxed her a copy of the application mailed to the FCC in August.⁷ FedEx states that she told it on December 23, 1996, to file another application because she could not locate any renewal application.⁸

4. On December 23, 1996, Hub Folding Box, Fischbach & Moore, Perini Corp., and Industrial Communications & Electronics, Inc., (referred to collectively as "the *Four Applicants*") submitted a set of five applications (referred to collectively as "the *Five Applications*") to the Personal Communications Industry Association, Inc. (PCIA), the Commission-certified frequency coordinator for 900 MHz Business Category channels.⁹ The *Four Applicants* proposed to operate a trunked community repeater on four of the five channels formerly licensed to Call Sign WNXJ987, at a location 21.7 miles from FedEx's Logan Airport facility.¹⁰

5. FedEx submitted the above-captioned application to reinstate the license for Call Sign WNXJ987 on December 24, 1996, almost 90 days after the date on which the license for Station WNXJ987 expired.¹¹ The application was not coordinated.

6. PCIA subsequently certified the *Five Applications*. PCIA forwarded them to the Commission between January 15, 1997, and February 5, 1997.¹²

7. The Branch returned FedEx's December 24 application on April 30, 1997, for correction and resubmittal¹³ on the grounds that, because it was submitted more than 30 days

⁴ See 47 C.F.R. § 90.149(b) (1996).

⁵ *Branch Letter* at 1.

⁶ Pursuant to an internal reorganization in 1997, the pertinent duties of the former Licensing Division relating to private wireless applications are now administered by the Public Safety and Private Wireless Division.

⁷ *Petition* at 4.

⁸ *Id.* at 5.

⁹ *Id.* at 6. Most applications for new PLMR assignments, including the 900 MHz Business Category channels involved in this proceeding, must include evidence of frequency coordination. 47 C.F.R. §§ 90.127(a), 90.175.

¹⁰ See FCC File Nos. D067119 (Hub Folding Box), D067118 (Fischbach & Moore), D067120 (Perini Corp.), and D069339 (Industrial Communications & Electronics, Inc. (Industrial)). Industrial also separately requested the fifth channel. See FCC File No. D067810.

¹¹ *Petition* at 5.

¹² *Branch Letter* at 1.

after the license expired, it was a new application that required frequency coordination rather than a reinstatement application which did not.¹⁴ FedEx then asked PCIA to provide a frequency coordination request for the operations proposed in the December 24 application, but PCIA declined to do so because FedEx's Logan Airport site with less than 55 miles from the facility proposed in the previously-coordinated *Five Applications*.¹⁵ FedEx resubmitted its application on May 30, 1997, along with a request for waiver of the frequency coordination requirement.¹⁶ The *Four Applicants* opposed FedEx's application.¹⁷

8. By letter dated December 11, 1998, the Branch denied FedEx's *Waiver Request* and dismissed the above-captioned application.¹⁸ The Branch concluded that FedEx had not demonstrated unique circumstances or a lack of reasonable alternatives justifying a waiver of the Commission's Rules.¹⁹ The Branch also found that FedEx had not demonstrated that it would serve the public interest to waive the Rules to allow FedEx's defective application to be processed because this would in turn cause dismissal of the *Five Applications*, which were properly coordinated and filed in accordance with the Commission's Rules.²⁰ The Branch stated that it would continue to process the *Five Applications*.²¹ FedEx filed a petition for reconsideration of the *Branch Letter* on January 11, 1999.

9. FedEx has continued to operate former Station WNXJ987 pursuant to special temporary authority.²² FedEx states that the facility is critical to its package delivery network because Logan Airport is FedEx's northeast regional sort facility, one of only 14 regional sorting operations worldwide.²³ FedEx states that it uses the five channels for security, maintenance,

¹³ Application Return Notice for the Private Land Mobile Radio Services (April 30, 1997). We note that the Branch should have returned the application to FedEx without processing, rather than returning it for correction and resubmittal. Return for correction and resubmittal, which permits the applicant to retain its place in the processing line if it timely resubmits the application, *see* 47 C.F.R. § 90.611(f), is proper only for applications that are "substantially complete," 47 C.F.R. § 90.611(a). An application that lacks evidence of required frequency coordination (or a request for waiver of the requirement) is not substantially complete. *See Waste Management, Collection & Recycling, Inc., Memorandum Opinion and Order*, FCC 99-134, at n. 37 (rel. June 21, 1999). Thus, we do not consider the December 24 application to have been filed at that time.

¹⁴ *See* 47 C.F.R. §§ 90.149(a), 90.175 introductory paragraph (1997).

¹⁵ *Id.* at 6. *See* 47 C.F.R. § 90.621(b)(4).

¹⁶ Federal Express Corporation Request for Rule Waiver filed on May 30, 1997 (*Waiver Request*).

¹⁷ *See Five Applicants Petition to Deny* filed on May 6, 1997. *See also* Federal Express Corporation Opposition filed on May 30, 1997, and *Five Applicants Reply* filed on June 11, 1997.

¹⁸ *Branch Letter* at 2-3.

¹⁹ *Id.* at 2.

²⁰ *Id.*

²¹ *Id.* at 3.

²² According to our licensing records, the special temporary authority is scheduled to expire on June 5, 2000.

²³ *Waiver Request* at 9; *Petition* at 14-15.

loading and offloading of aircraft, and other safety-related requirements at Logan Airport.²⁴ With regard to alternatives, FedEx states that it holds approximately 750 Commission licenses and routinely assesses whether to contract out its radio communications operations, but has concluded that maintaining its own private radio system is still the best option for it.²⁵ Moreover, FedEx states that it contacted other entities licensed in the Logan Airport vicinity and found that they cannot provide the access or capacity that FedEx requires for its business operations.²⁶

III. DISCUSSION

10. FedEx requested a waiver of the Commission's Rules to permit the reinstatement of its license for Station WNXJ987 without new frequency coordination, even though the application was filed more than 30 days after the license expired. Former Section 90.151 of the Commission's Rules required that waiver requests demonstrate that unique circumstances are involved and that no reasonable alternative is available.²⁷ We agree with the Branch that this standard has not been met.

11. FedEx contends on reconsideration that the Branch erred in concluding that the *Waiver Request* failed to satisfy the elements necessary to obtain the relief requested.²⁸ Specifically, FedEx states that the circumstances of this case are unique because it maintains approximately 750 Commission licenses, and it filed the renewal for Station WNXJ987 using the same procedures it routinely used for its other licenses.²⁹ FedEx contends that it had no reason to suspect that the renewal application would simply "disappear" and that it demonstrated diligence by monitoring the database and immediately reacting upon learning of the deletion.³⁰ It also contends that, given its operational needs, it has no reasonable alternative to the continued operation of its Logan Airport facility.³¹ FedEx further contends that we should therefore reconsider the *Branch Letter* and grant the *Waiver Request* as well as the above-captioned application.

12. The *Four Applicants* respond that the Branch correctly determined that the circumstances herein are not sufficiently unusual to support a waiver.³² Moreover, they contend that FedEx was not reasonably diligent in meeting its responsibility to ensure that its license was

²⁴ *Waiver Request* at 9; *Petition* at 14-15.

²⁵ *Petition* at 16-17.

²⁶ *Id.* at 17.

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

²⁸ See *Petition* at 8-14.

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

³¹ *Id.* at 18.

³² *Opposition* at 4.

renewed.³³ Finally, the *Four Applicants* argue that FedEx also failed to show that reasonable, even if less than ideal, communication alternatives are unavailable to support its Logan Airport operations or that it has considered acquiring replacement spectrum from an existing licensee.³⁴

13. We agree with the *Four Applicants* that FedEx has not demonstrated that it diligently prosecuted its renewal application. Even assuming *arguendo* that FedEx mailed the application – we nonetheless note that the record in this proceeding only establishes that the application was prepared and placed in a mail tray in FedEx’s office – FedEx failed to follow through adequately. For example, under the Rules applicants have the option to receive a date-stamped copy indicating FCC receipt of an application.³⁵ FedEx either did not avail itself of this option, or failed to timely note that it did not receive its date-stamped copy from the Commission. Also, it appears that FedEx failed to keep track of whether the check for the renewal fee was deposited.³⁶ Further, we are not persuaded by FedEx’s contention that it had no reason to suspect anything was amiss with the August 1996 application until Station WNXJ987 was deleted from the database. We do not believe that monitoring the database is a highly effective method of determining the status of one’s renewal application given that the deletion of a license from the database would not occur until the 30-day reinstatement period expired.³⁷

14. We also note the Commission’s strong interest in preserving the clarity of when other applicants may permissibly file for expired PLMR licenses.³⁸ We believe that granting FedEx’s *Waiver Request* and reinstating its canceled license, under the circumstances presented here, would frustrate the goal of providing a date certain upon which other PLMR eligibles may file an application for the channel and area covered by an expired license.³⁹

15. Finally, we note that Fed Ex does not offer specific, supported claims of erroneous conclusions of fact or law that would require reversal of the *Branch Letter*.⁴⁰ In this

³³ See *id.* at 5-6.

³⁴ See *id.* at 7-8; Opposition to Emergency Motion for Stay filed by Hub Folding Box, Fischbach & Moore, Perini Corp., and Industrial Communications & Electronics, Inc. on January 13, 1999, at 7.

³⁵ 47 C.F.R. § 1.1110(f) (1996); see also Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, *Memorandum Opinion and Order*, Gen. Docket No. 86-285, 5 FCC Rcd 3558, 3567 ¶ 18 (1990) (date stamped courtesy copies are available by mail to applicants who provide an extra copy of the submission together with a stamped, self-addressed envelope).

³⁶ *Opposition* at 6.

³⁷ 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 ¶ 24 (1991) (*PLMR Report*).

³⁸ See, e.g., *PLMR Report*, 6 FCC Rcd at 7300-01 ¶¶ 19-21; Amendment of Parts 1 and 90 of the Commission’s Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Memorandum Opinion and Order*, PR Docket No. 90-481, 8 FCC Rcd 6690, 6690-91 ¶ 3-5 (1992).

³⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁴⁰ Petitions for reconsideration must, where appropriate, cite the findings of fact and/or conclusions of law which the petitioner believes to be erroneous. See 47 C.F.R. § 1.106(d)(2).

connection, we acknowledge FedEx's contention⁴¹ that the Commission retained discretion to waive the reinstatement/late-filed renewal rules when warranted by particular circumstances such as those presented in *New York City Transit*.⁴² Briefly, in *New York City Transit* the Commission waived the reinstatement/late-filed renewal rules over the objection of a potential applicant for the channels involved after finding that:

[T]he proposed system is a unique one, involving the safety of millions of passengers on thousands of buses, and it is totally dependent on retention of the 20 channels at issue. The safe and efficient operation of the urban mass transportation system for the largest city in the United States would be seriously compromised by cancellation of these licenses.⁴³

16. This precedent does not assist FedEx because the present case does not involve the extraordinary public interest considerations found in *New York City Transit*. We also note that FedEx's *Waiver Request* was opposed by other *pending* applicants who filed applications at a time when the channels in question were available for reassignment. By contrast, the waiver request in *New York City Transit* was opposed by a *potential* applicant; moreover, the channels involved in *New York City Transit* had not been made available for reassignment to other applicants.⁴⁴

IV. CONCLUSION

17. In sum, FedEx's license expired; thus, it retained no authorization to operate on the five channels after such expiration except for the special temporary authority that it has received to do so. We are not persuaded that FedEx's contention that it did not discover that its renewal application was lost in the mail until after the license had expired and was deleted from the Commission's licensing database justifies a waiver of the frequency coordination rules. We find no error with the Branch's denial of the *Waiver Request*.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by Federal Express Corporation on January 11, 1999, IS DENIED.

⁴¹ See Motion at 1.

⁴² See New York City Transit Authority, *Memorandum Opinion and Order*, 4 FCC Rcd 4488 (1988) (*New York City Transit*).

⁴³ *Id.* at 4489 ¶ 12.

⁴⁴ *Id.* at 4489 n. 17; see also Industrial Communications & Electronics, Inc., *Order on Reconsideration*, 13 FCC Rcd 8417 (WTB CWD 1998).

19. IT IS FURTHER ORDERED that the Emergency Motion for Stay Pending Reconsideration filed by Federal Express Corporation on December 31, 1998, IS DISMISSED AS MOOT.

20. IT IS FURTHER ORDERED that the special temporary authority for Federal Express Corporation to operate on the subject 900 MHz Business Category Channels in the Boston, Massachusetts area under Call Sign WNXJ987 is terminated as of 30 days from the release of this *Memorandum Opinion and Order*.

21. 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

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