

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

In the Matter of:)	
)	
North Sight Communications, Inc.)	File No. D045272
)	
Application for Modification of Trunked)	
SMR Station WPHN735)	
Bo Guaraguao, Puerto Rico)	

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 2001

Released: April 25, 2001

By the Chief, Commercial Wireless Division:

I. Introduction

1. By this order, the Commercial Wireless Division of the Wireless Telecommunications Bureau grants a modification application filed on July 17, 1996, by North Sight Communications, Inc. (North Sight) for permanent authorization to transmit at Aguas Buenas, Puerto Rico,¹ and also grants North Sight's application for waiver of the 800 MHz SMR application "freeze" filed the same day.

II. Background

2. On June 27, 1995, North Sight was granted the license for 800 MHz SMR station WPHN735 pursuant to a finder's preference award.² North Sight was authorized to transmit on frequencies 856-860.0125 MHz, and its one-year construction deadline was June 27, 1996. North Sight attempted to locate the station at Bo Guaraguao, Puerto Rico, the site authorized to the target licensee who had lost the license pursuant to North Sight's finder's preference claim. North Sight was unable to reach an agreement with that tower owner, however, and it subsequently filed an application for Special Temporary Authority (STA) to construct the station at Aguas Buenas, Puerto Rico, some 2.98 miles from the initially authorized site.³ On June 24, 1996, the Bureau granted an STA for the second site, and North Sight reported that it constructed the station the following day, two days before the one-year construction deadline for the original site.⁴

¹ File No. D045272.

² A license was issued for Station WPHN735 on June 27, 1995, at 18-17-34N, 066-09-24W, with an Effective Radiated Power (ERP) of 250 watts and Height Above Average Terrain of 21 meters.

³ The new site is located at 18-16-54N, 066-06-46W.

⁴ See Letter from Lloyd W. Coward, Counsel for North Sight Communications, to FCC, Wireless Telecommunications Bureau, Gettysburg, Pa. (dated Aug. 24, 1998) (citing North Sight's response to FCC Form 800-A letter requesting certification of timely construction).

3. On July 18, 1996, approximately three weeks after the construction deadline, North Sight filed an application to modify its license to reflect its operation at the Aguas Buenas site. North Sight also filed a request for waiver of the Commission's freeze on acceptance of 800 MHz SMR applications, which had been imposed in the 1994 *CMRS Third Report and Order* in GN Docket No. 93-252.⁵ On October 15, 1998, North Sight's modification application and freeze waiver request were dismissed by the Division's Licensing and Technical Analysis Branch.⁶ In addition, because North Sight had not constructed at its originally licensed site, the Branch found its license to be cancelled for failure to construct. North Sight petitioned for reconsideration, and the Branch affirmed its prior decision on October 19, 1999.⁷ North Sight then filed an application for review of the Branch decision.

III. Discussion

4. Upon further review of the facts of this case, we conclude on our own motion that North Sight's request for relief should be granted, subject to certain conditions. Although North Sight did not construct within one year at its originally licensed site, it constructed at a site less than three miles away and obtained an STA within the one-year time frame. North Sight should also have filed a site modification application simultaneously with its STA request in order to ensure that the construction of the Aguas Buenas facility would count towards completion of the construction requirement. However, because North Sight did not file its modification application until three weeks after the construction deadline, the application was untimely and subject to dismissal under the 800 MHz application freeze, and the license was subject to cancellation for failure to construct at the original site.

5. Section 1.925 of the Commission's rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light 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.⁸ We conclude that in this case, strict application of the rule would not serve the underlying purpose of the rule or the public interest. North Sight was required to move from its initially authorized site due to circumstances beyond its control (the tower owner's unwillingness to allow North Sight's operation), and moved to an alternative site less than three miles from the originally authorized site. North Sight also commenced operations within the one-year construction period, and obtained an STA to avoid unauthorized operation. Finally, the record indicates that North Sight provides service to a significant number of public safety entities on its system.⁹

⁵ See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd. 7988, 8047-8 (¶ 108)(1994).

⁶ Letter from Ronald B. Fuhrman, Deputy Chief, Technical Analysis Section, Commercial Wireless Division, Wireless Telecommunications Bureau to Lloyd W. Coward, Esq., dated October 15, 1998.

⁷ See Letter from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau to Lloyd W. Coward, Esq., dated October 19, 1999.

⁸ 47 C.F.R. 1.925(a)(3)(ii).

⁹ See Application for Review filed by North Sight Communications, dated Nov. 19, 1999, at fn. 7.

6. Given the involuntary and limited nature of the site relocation, the fact that North Sight commenced operations within one year, and the presence of public safety users on the system, we conclude that North Sight's modification application should be accepted and processed even though it was filed three weeks after the construction deadline. Indeed, we note that in December 1995, the Commission in the *800 MHz SMR First Report and Order* allowed incumbent licensees in the 800 MHz SMR upper band to modify their facilities on a permissive basis, provided they did not alter the original interference contour of the license.¹⁰ At the time North Sight filed its modification application, these procedures did not yet apply to the 800 MHz lower band, which includes North Sight's channels, but the Commission had proposed to extend them and subsequently did so in the *800 MHz Second Report and Order*.¹¹ Thus, these rules would have allowed North Sight to make the modification it seeks without prior Commission approval.

7. In granting relief to North Sight, we will require North Sight to operate within the originally licensed interference contour pursuant to Section 90.693(b)-(c) of the Commission's rules. In its modification application, North Sight initially sought to operate at 1000 watts effective radiated power (ERP), which would have altered the original contour.¹² However, North Sight proposed in the alternative to operate at 100 watts ERP, which it demonstrated would not exceed the originally licensed contour.¹³ Based on this alternative showing, we grant the waiver provided that North Sight maintains its original contour in accordance with section 90.693(b)-(c).¹⁴

IV. Ordering Clauses

8. Accordingly, IT IS ORDERED that, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.925, North Sight's application for modification and application for waiver submitted on July 17, 1996, ARE GRANTED as described herein.

9. IT IS FURTHER ORDERED that the license for Station WPHN735 is REINSTATED.

¹⁰ See 47 C.F.R. § 90.693 (1996); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 1463 (1995) (*800 MHz First Report and Order*).

¹¹ See 47 C.F.R. § 90.693(b), (c); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *Second Report and Order*, 12 FCC Rcd. 19079, 19105 (¶67) (1997) (*800 MHz Second Report and Order*).

¹² In its original application to modify, North Sight also submitted an interference contour analysis to show compliance with the rules for short-spaced stations. 47 C.F.R. § 90.621(b)(6). See Request for Waiver filed by North Sight, dated July 16, 1996, at Exhibit Two.

¹³ Letter from Lloyd W. Coward, Counsel for North Sight Communications, to FCC, Wireless Telecommunications Bureau, Gettysburg, Pa. (Aug. 24, 1998).

¹⁴ 47 C.F.R. 90.693(b)-(c).

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze
Chief
Commercial Wireless Division
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