

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

In the Matter of
PEMBROOKE OF LOUDOUN
UNIT OWNERS ASSOCIATION
Application for Conventional Industrial/Business
Pool Station in the Private Land Mobile Radio
Services
FCC File No. D138962

ORDER ON RECONSIDERATION

Adopted: April 27, 2001

Released: May 1, 2001

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

1. Introduction. Pembroke of Loudoun Unit Owners Association (Pembroke) has requested reconsideration of the dismissal of the above-captioned application to operate on low power VHF frequencies 151.820 MHz, 151.880 MHz, and 151.940 MHz by the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division (Branch). For the reasons stated below, we grant the petition for reconsideration.

2. Background. In October 1998, the Commission released a Notice of Proposed Rulemaking inviting comment on whether five "color dot" frequencies should be reallocated from the Part 90 Private Land Mobile Radio Service (PLMRS) to one of the Citizens Band Radio (CB) Services in Part 95. The Commission also invited comment on whether to eliminate the individual licensing requirements, i.e. license application requirement, in connection with such a redesignation of the frequencies because the majority of users operating on the color dot frequencies were not licensed. In a Report and Order and

1 Letter to Pembroke of Loudoun Unit Owners Association from Chief, Licensing and Technical Analysis Branch, Notice of Application Dismissal, FCC Form 574E (filed July 28, 2000) (Dismissal Letter).

2 Letter to Secretary, Federal Communications Commission from David R. Boltson, President, Pembroke of Loudoun Unit Owners Association (filed Aug. 25, 2000) (Petition).

3 These frequencies are 154.570 MHz, 154.600 MHz, 151.820 MHz, 151.880 MHz, and 151.940 MHz. See 1998 Biennial Regulatory Review - 47 C.F.R. Part 90 - Private Land Mobile Radio Services, Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, WT Docket 98-182, RM-9222, PR Docket 92-235, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 16673, 16687 n.93 (2000) (Part 90 R&O).

4 See 1998 Biennial Regulatory Review - 47 C.F.R. Part 90 - Private Land Mobile Radio Services, Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services, WT Docket 98-182, RM-9222, PR Docket 92-235, Notice of Proposed Rulemaking, 13 FCC Rcd 21133, 21144 ¶¶ 31-32 (1998).

5 Id.

*Further Notice of Proposed Rulemaking*, released July 12, 2000, the Commission reallocated the five color dot frequencies from the Part 90 PLMRS to a new radio service category in the CB services, the Multi-Use Radio Service (MURS).<sup>6</sup> The Commission also eliminated the individual licensing requirements for these color dot frequencies.<sup>7</sup> Accordingly, as of November 13, 2000, the effective date of these rule changes,<sup>8</sup> the Commission stopped issuing individual licenses to authorize private land mobile radio operations on the “color dot” frequencies.

3. On February 18, 2000, Pembroke filed a license application to operate on frequencies 151.820 MHz, 151.880 MHz, and 151.940 MHz in the Loudoun County, Virginia area. The Branch returned the application to Pembroke for correction on June 28, 2000, shortly before the Commission adopted the *Part 90 R&O*.<sup>9</sup> Pembroke requested clarification of the Branch’s instructions a week after the Commission eliminated the licensing requirements for the three frequencies.<sup>10</sup> On July 28, 2000, the Branch dismissed Pembroke’s application for failing to correct its application within the requisite time.<sup>11</sup> The Branch further noted that dismissal was warranted because use of the requested frequencies would no longer require an individual license.

4. By letter dated August 23, 2000, Pembroke requested reconsideration of the Branch’ action, saying the Branch erred in dismissing Pembroke’s application for failing to make the requested corrections.<sup>12</sup> Thus, Pembroke requests reinstatement of its application.<sup>13</sup>

5. *Discussion.* Based upon our review of the matter, we agree with Pembroke that its application was dismissed in error. The Branch dismissed Pembroke’s application for two reasons. The first reason was that Pembroke did not comply with the one-watt power limitation applicable to the frequencies in question<sup>14</sup> and “failed to correct the application when we returned the application to you on 6/22/00.”<sup>15</sup> The Return Letter was dated June 22, 2000, and gave Pembroke sixty days (or until August

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<sup>6</sup> See *Part 90 R&O*, 15 FCC Rcd 16673, 16687-8 ¶¶ 30-31. We note that Motorola, Inc. has filed a Petition for Reconsideration on this issue. See Motorola, Inc. Petition for Reconsideration (filed Nov. 13, 2000).

<sup>7</sup> *Id.* The Commission also allowed two-watt operations on the five color dot frequencies, including those for which operation was formerly limited to one watt. *Id.*

<sup>8</sup> See 65 Fed. Reg. 60869 (2000).

<sup>9</sup> Letter to Pembroke of Loudoun Unit Owners Association from FCC, Gettysburg, PA (dated June 22, 2000) (Return Letter). The Commission adopted the *Part 90 R&O* on June 28, 2000.

<sup>10</sup> Letter to FCC, Gettysburg, PA from David R. Boltson, President, Pembroke of Loudoun Unit Owners Association (filed July 18, 2000).

<sup>11</sup> Dismissal Letter.

<sup>12</sup> Petition.

<sup>13</sup> *Id.*

<sup>14</sup> See 47 C.F.R. § 90.35 n.14 (2000).

<sup>15</sup> See Dismissal Letter.

21, 2000) to amend its application.<sup>16</sup> The dismissal letter, however, was dated July 28, 2000, which was before the period within which Pembroke was given to amend its application had expired. Accordingly, the Branch erred when it dismissed Pembroke's application for failing to correct the application. The second reason given for dismissing the application was that the frequencies were being allotted to the MURS and that no license would be necessary to operate on those frequencies thirty days after the *Report and Order and Further Notice of Proposed Rulemaking* was published in the *Federal Register*.<sup>17</sup> We believe that it was premature for the Branch to base its action on the Pembroke application on this premise because the rules establishing the MURS did not become effective until November 13, 2000, which was several months after the Branch dismissed Pembroke's application. Thus, we conclude that the basis for the Branch's action on Pembroke's application were erroneous. Consequently, Pembroke's reconsideration request will be granted.

6. Notwithstanding our conclusion that the Branch's reasons for the dismissal of Pembroke's application was erroneous, we still find that Pembroke's application should be dismissed, albeit for a different reason. Upon grant of the instant reconsideration petition, Pembroke's application for a license to operate on 151.820 MHz, 151.880 MHz, and 151.940 MHz, would be subject to reinstatement. In light of the Commission's decision in the Part 90 R&O to establish the MURS, the requirement to obtain individual licensing requirements for the three frequencies has been eliminated; as a result, Pembroke may operate on those frequencies without a license.<sup>18</sup> Consequently, we would then dismiss the application because, under the Commission's current Part 90 rules, no license will be issued to operate on the requested frequencies.<sup>19</sup> Based on the record before us, we find that the relief ultimately requested in the reconsideration petition is inconsistent with the current rules, and thus, not available.

7. *Conclusion.* On the basis of the foregoing discussion, we conclude that Pembroke's petition for reconsideration is granted. However, the subject application remains dismissed because there is no longer an individual licensing requirement for the subject frequencies.

8. *Ordering Clause.* ACCORDINGLY, pursuant to the authority of Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 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 August 23, 2000, by Pembroke of Loudoun Unit Owners Association IS GRANTED.

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<sup>16</sup> See Return Letter.

<sup>17</sup> See Dismissal Letter.

<sup>18</sup> If Pembroke chooses to operate on the requested frequencies it may do so restricted to two watts effective radiated power (ERP). See *Part 90 R&O*, 15 FCC Rcd at 16688 ¶ 31. Alternatively, if Pembroke's operations require power output in excess of two watts ERP it may apply for additional frequencies, which may be subject to frequency coordination. See 47 C.F.R. § 90.175.

<sup>19</sup> It is well established that the Commission may apply new rules to pending applications. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (pending TV station license application dismissed after substantive rule change); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220 MHz Band by the Private Land Mobile Radio Service, *Third Report and Order*, PR Docket No. 89-522, 12 FCC Rcd 10943, 11040 ¶ 206 (1997).

9. 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  
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