

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

In the matter of
PAGING SYSTEMS, INC.
Request for Construction Extension for Three
Automated Maritime Telecommunications System
Stations

ORDER ON RECONSIDERATION

Adopted: June 13, 2001

Released: June 15, 2001

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

1. Introduction. On December 15, 2000, Paging Systems, Inc. (PSI) requested reconsideration of a decision by the Public Safety and Private Wireless Division (Division) denying PSI's request for waiver of the Commission's Rules to extend the construction deadline for three Automated Maritime Telecommunications System (AMTS) stations. For the reasons stated below, we deny the Petition.

2. Background. AMTS stations provide automated, integrated, interconnected ship-to-shore communications similar to a cellular phone system for tugs, barges, and other maritime vessels. On February 10, 2000, PSI was granted licenses for AMTS stations in Ocean City, Maryland (Station WHV949), Fort Pierce, Florida (Station WRV468), and Myrtle Beach, South Carolina (Station WXY924). At that time, Section 80.49(a)(2) of the Commission's Rules required that AMTS stations be placed in operation within eight months of the license grant.

3. Based upon the record before us, it appears that PSI did not construct these stations on or before October 10, 2000, and, as a result, these authorizations automatically cancelled pursuant to Section 1.955(a)(2) of the Commission's Rules on October 11, 2000. On October 17, 2000, after the authorizations had automatically cancelled, PSI sought a waiver of the construction requirement and asked that the construction deadline be extended to two years from the date of grant because it needed additional time to negotiate with site owners for its proposed facilities.

1 Petition for Reconsideration, filed December 15, 2000, by Paging Systems, Inc. (Petition).

2 Paging Systems, Inc., Order, 15 FCC Rcd 23983 (WTB PSPWD 2000) (Waiver Order).

3 See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), First Report and Order, GEN Docket No. 88-732, 6 FCC Rcd 437, 437 ¶ 3 (1991).

4 See Public Notice, Report No. 2080, rel. Feb. 15, 2000.

5 See 47 C.F.R. § 80.49(a)(2) (1999).

6 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 1.946(c).

7 Letter from Audrey Rasmussen, Hall, Estill, Hardwick, Gable, Golden & Nelson, to Kimberly Kleppinger, Wireless Telecommunications Bureau, Federal Communications Commission (dated Oct. 17, 2000) (PSI Waiver Request).

4. On December 6, 2000, the Division denied PSI's request. The Division reviewed the waiver request pursuant to Section 1.925(b)(3) of the Commission's Rules which provides that the Commission may grant a request for waiver if a) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and grant of a waiver would be in the public interest; or b) in view of unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁸ The Division concluded that PSI had not demonstrated that waiver of the construction requirement was warranted under either standard and dismissed the request as moot because the authorizations had already cancelled when PSI filed its waiver request.⁹ On December 15, 2000, PSI requested reconsideration of this decision.

5. *Discussion.* PSI notes that, prior to the release of the *Waiver Order*, the Commission had determined that extending the construction period from eight months to two years was in the public interest when it amended Section 80.49(a)(2) of the Commission's Rules in the *Fourth R&O*.¹⁰ PSI argues that the Division's conclusion that granting PSI a waiver of the construction period rule would not further the rule's underlying purpose contradicts the Commission's determination that such an extended construction period was in the public interest.¹¹ PSI also argues that the decision violates Supreme Court precedent governing the retroactive effect of interpretation of agency rules and the Administrative Procedure Act proscription on arbitrary and capricious decisions.¹² PSI contends that the Division is bound by Supreme Court precedent which mandates that "a new federal decision "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule."¹³ PSI further argues that the Division is bound by Commission precedent which states that a three-year construction date will apply to construction permits that have been canceled but have been timely appealed.¹⁴

6. We disagree with PSI's arguments. We find the date on which PSI filed its waiver request, October 17, 2000, to be of great decisional significance. Under the Commission's Part 1 rules for the Wireless Services, if a licensee fails to commence service or operations by the expiration of its construction period, "its authorization terminates, without specific Commission action, on the date the construction period... expires."¹⁵ In the instant matter, when PSI received its authorizations for the subject stations, the construction period for AMTS stations was eight months.¹⁶ As a result, PSI was required to commence service or operations of the subject stations on or before October 10, 2000. Given that PSI failed to do so, the station authorizations cancelled as of October 11, 2000.

⁸ *Waiver Order*, 15 FCC Rcd at 23984 ¶ 4. See also 47 C.F.R. § 1.925(b)(3).

⁹ *Waiver Order*, 15 FCC Rcd at 23984-23985 ¶¶ 4-5.

¹⁰ Petition at 2. In this connection, we note that on November 16, 2000, the Commission adopted a *Report and Order* amending Section 80.49(a)(2) to extend the construction period for new AMTS stations from eight months to two years. The rule amendment took effect on January 7, 2001. See 65 Fed. Reg. 76966 (Dec. 8, 2000).

¹¹ *Id.*

¹² *Id.* at 2-3 (citing 5 U.S.C. § 551 *et seq.*).

¹³ Petition at 2-3 (citing *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) (*Harper*)).

¹⁴ Petition at 3 (citing 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Process, *Memorandum Opinion and Order*, MM Docket No. 98-43 13, FCC Rcd. 23056, 23092-23093 ¶ 89 (1998) (*Mass Media Biennial Review*); 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Process, *Memorandum Opinion and Order*, MM Docket No. 98-43, 14 FCC Rcd 17525 (1999)).

¹⁵ 47 C.F.R. § 1.946(c).

¹⁶ 47 C.F.R. § 80.49(a)(2).

7. Further, as the Division noted in the *Waiver Order*,¹⁷ PSI did not request a waiver of its construction deadline until October 17, 2000. Since PSI's license already had automatically cancelled on October 10, 2000, we find that the Division properly dismissed PSI's waiver request as moot since there was no authorization to extend. Moreover, if PSI was interested in seeking an extension of the construction period for the subject stations, such request was required to have been filed prior to the end of the construction period.¹⁸ Thus, PSI's October 17, 2000 submission, to the extent that it was intended to serve as an extension request, was untimely.

8. In addition, we do not believe that the *Harper* decision is applicable to the case before us. The *Harper* decision states that when the Supreme Court applies a rule of federal law to the parties before it, every court must give that law full retroactive effect in all cases still open on direct review. It does not state that an *agency* must apply a similar standard of retroactive effect when it amends one of its rules.¹⁹ Numerous federal courts have agreed that the retroactivity analysis set forth in both the *Harper* decision and the Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529(1991) (*Beam*) is not applicable to decisions made by administrative agencies. For example, in *Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Corporation*, 26 F.3d 375, 386 n.8 (3rd Cir. 1994) the court noted that "there are cogent grounds for distinguishing administrative agencies from federal courts" and that "the Supreme Court likely would not extend the doctrine disapproving of 'selective prospectivity' to agencies or Article I courts".²⁰ Moreover, we reiterate that the amended rule could not have been applied retroactively in this case, because the licenses cancelled automatically before the Commission adopted the amendment, and the new rule had not taken effect at the time of the Division's decision.

9. Finally, we find that PSI's reliance on the *Mass Media Biennial Review* is similarly misplaced. That decision was limited to construction periods in the broadcast context and is not applicable to this matter.

10. Accordingly, IT IS ORDERED, that, pursuant to 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, the petition for reconsideration filed by Paging Systems, Inc., on December 15, 2000, IS DENIED.

¹⁷ *Waiver Order*, 15 FCC Rcd at 23984-23985 ¶¶ 4-5. See also Daniel R. Goodman, Receiver; Dr. Robert Chan, *Memorandum Opinion and Order and Order on Reconsideration*, 13 FCC Rcd. 21,944, 21,972 & n.185 (1998) (licensees seeking an extension of time to construct must file their waiver request prior to the cancellation of its license because the license cancels at the end of the original construction deadline).

¹⁸ 47 C.F.R. § 1.946(e).

¹⁹ *Harper*, 509 U.S. at 97.

²⁰ The *Laborers* court listed several judicial opinions that reject the application of the *Harper* and *Beam* retroactivity analysis to administrative agencies explicitly, *Id. citing District Lodge 64, Int'l Ass'n of Aerospace Workers v. NLRB*, 949 F.2d 441, 447 (D.C. Cir.1991). The court further noted that the *Harper* and *Beam* decisions have limited use in an administrative context because the judicial concept of *stare decisis* is far less rigorous in an administrative context than in the judicial context, *Id. citing NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) ("[A] Board rule is entitled to deference even if it represents a departure from the Board's prior policy"). The court also noted that agencies, unlike Article III courts, have both judicial and legislative powers, and that when an agency exercises its legislative powers, neither the "cases" or "controversies" prerequisite, nor the rule of *stare decisis* is applicable. *Id.*

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

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Chief, Public Safety and Private Wireless Division
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