

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

In the Matter of	)	
	)	
JONACH ELECTRONICS	)	FCC File No. A036957
	)	
Petition for Reconsideration of Grant of License	)	
for Station WPNX320, Morristown, New Jersey	)	

**ORDER ON FURTHER RECONSIDERATION**

**Adopted:** June 29, 2001

**Released:** July 2, 2001

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

1. *Introduction.* In this *Order on Further Reconsideration* we address a petition for reconsideration (Petition) filed by Atlantic Express Transportation Group, Inc., and its wholly-owned subsidiary, Winsale, Inc. (Petitioners).<sup>1</sup> The Petitioners seek reconsideration of an *Order on Reconsideration* by the Policy and Rules Branch, Public Safety and Private Wireless Division (Branch) in the above-captioned proceeding.<sup>2</sup> The *Order* dismissed, as untimely filed, Petitioners' reconsideration petition of a decision by the Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division (L&TAB), granting Trunked Industrial/Business Radio Service license to Jonach Electronics for Station WPNX320, Morristown, New Jersey.<sup>3</sup> For the reasons stated below, the Petition is denied.

2. *Background.* On July 22, 1999, the Commission granted a license to Jonach for Station WPNX320 to operate on frequencies 157.4475 MHz and 157.4925 MHz.<sup>4</sup> The Petitioners allege that the Station unlawfully interferes with the operation of Station WNVG529, licensed to Winsale in November 1995, to operate on frequency 157.4850 MHz in the Jersey City, New Jersey area. They also contend that two of the five channels allocated to Jonach's station, namely -- 157.4475 MHz and 157.4925 MHz, cause adjacent channel interference to Winsale's operation on 157.4850 MHz.<sup>5</sup> The Petitioners further submit that as Jonach was proposing trunked operations,<sup>6</sup> the latter was required to either obtain the consent of any affected licensee(s) to its proposed operations, or provide an engineering study showing that the proposed system's interference contour would not overlap the service area contour of any affected licensee(s).<sup>7</sup> The

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<sup>1</sup> Atlantic Express Group, Inc. and Winsale, Inc., Petition for Reconsideration (filed Jan. 17, 2001) (Petition). For ease of reference we refer to Atlantic Express and Winsale collectively as Petitioners.

<sup>2</sup> Jonach Electronics, *Order on Reconsideration*, DA 00-2834 (PSPWD 2000).

<sup>3</sup> Petition for Reconsideration (filed June 1, 2000) (June Petition).

<sup>4</sup> Application File No. A036957.

<sup>5</sup> June Petition at 1.

<sup>6</sup> Trunked radio system is a method of operation in which a number of radio frequency pairs are assigned to mobile and base stations in the system for use as a trunked group. See 47 C.F.R. § 90.7.

<sup>7</sup> June Petition at 1 citing 47 C.F.R. § 90.187(b)(2) (1998).

Petitioners assert that neither of these criteria was met.<sup>8</sup> The Petitioners submit that, since it is in the business of providing transportation services, it cannot afford to incur interference to its radio operations.<sup>9</sup>

3. According to the Petitioners, the Industrial Telecommunications Association, Inc. (ITA), first notified them of the WPNX320 license and the adjacent channel interference in a letter dated May 18, 2000.<sup>10</sup> The Petitioners further submit that the frequency coordinator used by Jonach erred in certifying the WPNX320 application to the Commission, and the Commission erred in granting the subject license application.<sup>11</sup> Because WPNX320 is a private land mobile radio (PLMR) station, grant of the subject license application did not appear on public notice. Consequently, the Petitioners argue, the time for appealing the grant of the application did not start until they received actual notice of the grant of the application on May 18, 2000.<sup>12</sup> As the Petition was filed on June 1, 2000, within thirty days of receipt of actual notice on May 18, 2000, the Petitioners contend that their pleading is timely filed.<sup>13</sup>

4. On December 18, 2000, the Branch dismissed the Petitioners' reconsideration petition, saying it was untimely filed.<sup>14</sup> The Branch said that the date of public notice is the date the subject license was mailed to "persons affected by the action" which was on July 22, 1999.<sup>15</sup> The Branch concluded that "Winsale is not a person affected by the licensing action because it was not a party to the application proceeding."<sup>16</sup>

5. On January 17, 2001, the Petitioners requested reconsideration of the Branch's action. In their Petition, the Petitioners argue that the Branch erred in dismissing the initial petition on procedural grounds.<sup>17</sup> The Petitioners repeat their actual notice argument, adding that to hold otherwise would contradict long standing Commission precedents and practice, be arbitrary and capricious, and violate the Petitioners' due process rights. The Petitioners also argue that the Branch erred in concluding that they were not persons "affected" by the license grant.<sup>18</sup> In this regard, the Petitioners argue that because Section

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<sup>8</sup> *Id.* at 1-2.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> For ITA's interference analysis *see id.* at Attachment 1.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Pursuant to 47 C.F.R. § 1.106(i), the June Petition was correctly filed at the Office of the Secretary, Washington, D.C.

<sup>14</sup> Jonach Electronics at ¶¶ 4-5. The Branch indicated that the dismissal "is without prejudice to the right of the L&TAB to independently investigate this matter and take any appropriate action." *Id.* at ¶ 4 n. 18.

<sup>15</sup> *Id.* at ¶ 4.

<sup>16</sup> *Id.*

<sup>17</sup> Petition at 1. Pursuant to 47 C.F.R. § 1.106(i), the Petition was timely and correctly filed at the Office of the Secretary, Washington, D.C.

<sup>18</sup> *Id.* at 3-4.

90.187 of the Commission's Rules classifies them as "affected" *vis-a-vis* any future adjacent co-channel applicants (such as Jonach) they are also "persons affected" under Section 1.4(b)(5) of the Commission's Rules<sup>19</sup> and thus entitled to notice of the license grant.<sup>20</sup> Accordingly, the Petitioners contend, the Branch's *Order on Reconsideration* should be reversed and the merits of Petitioner's interference arguments should be heard.<sup>21</sup>

6. *Discussion.* Based on our review of the record in this proceeding, we believe that the Petitioners make two primary arguments. First, they repeat their argument that the thirty-day period for filing petitions for reconsideration did not begin to run until they received actual notice of the grant of Jonach's application. Second, the Petitioners argue that the thirty-day period did not begin to run because they were allegedly "persons affected by the action" within the meaning of Section 1.4(b)(5) of the Commission's Rules but that the Commission did not send them notice of the grant of Jonach's application.<sup>22</sup> We reject both arguments and affirm the Branch's conclusion that the earlier petition for reconsideration was untimely.

7. The Petitioners' first argument is inconsistent with the plain language of Section 1.4(b)(5), which provides, "If a document is neither published in the FEDERAL REGISTER nor released, and if a descriptive document entitled 'Public Notice is not released, the date appearing on the document sent (*e.g.* mailed, telegraphed, etc.) to persons affected by the action" is the date of Public Notice.<sup>23</sup> The plain language of the rule provides that the "public notice" date is established by the date on the document, as opposed to the date of actual notice.<sup>24</sup> While the Petitioners argue that this result "contradicts long standing Commission precedents and practice," they cite no precedent supporting their position.<sup>25</sup> Indeed, the United States Court of Appeals for the District of Columbia Circuit has rejected the argument that the filing period runs from the date of personal notice to the parties.<sup>26</sup>

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<sup>19</sup> 47 C.F.R. § 1.4(b)(5).

<sup>20</sup> Petition at 3-4 citing 47 C.F.R. § 90.187(b)(2) (1998).

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 3-4.

<sup>23</sup> 47 C.F.R. § 1.4(b)(5). *See e.g.* Gary E. Stoffer, *Order*, 13 FCC Rcd 14056, 14058 ¶ 6 (CWD 1998).

<sup>24</sup> We take this opportunity to correct the previous decision where the Branch said the date of public notice is the date the license is mailed. Jonach Electronics at ¶¶ 4-5. The date of public notice is the date appearing on the license grant. 47 C.F.R. § 1.4(b)(5).

<sup>25</sup> The Petitioners also contend that the decisions cited in the Branch's *Order* as support for dismissing the June Petition as untimely are inapposite to the instant case because the Commission provided notice in those cases. Petition at 1-3, *citing* Panola Broadcasting Co., *Memorandum Opinion and Order*, 68 FCC 2d 533 (1978), Metromedia, Inc., *Memorandum Opinion and Order*, 56 FCC 2d 909 (1975), Petition for the Amendment of Commission Rules to Establish First and Second Class Radiotelephone Operator Licenses, *Order*, 10 FCC Rcd 3196 (1995); and Memorandum of Agreement Between the FCC and Elkins Institute, Inc., *Order on Reconsideration*, 14 FCC Rcd 5080 (WTB 1999). The Petitioners, however, fail to address that the petitioners in those cases were parties to the underlying proceeding from which reconsideration was sought. Here, the Petitioners were not parties to the licensing proceeding.

<sup>26</sup> *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976).

8. Because the time for filing a petition for reconsideration is prescribed by statute, the Commission may not ordinarily waive or extend the filing period.<sup>27</sup> The courts have held that the Commission may not accept untimely reconsideration petitions in the absence of extremely unusual circumstances.<sup>28</sup> The United States Courts of Appeals for the D.C. Circuit, however, created a narrow exception to this rule in the *Gardner* case.<sup>29</sup> The court held that in the case of “extraordinary” circumstances, the Commission may waive or extend the thirty-day filing period for a petition for reconsideration where the late filing is due to the Commission's failure to give parties customary notice of the action taken for which reconsideration is sought.<sup>30</sup> The court later limited the *Gardner* holding to the specific facts of that case.<sup>31</sup> The Commission has since applied that standard to its own proceedings, focusing on whether the Commission has failed to comply with any notice requirements.<sup>32</sup> The *Gardner* court specifically limits its holding to cases where the Commission failed to adhere to its procedural rules for providing notice of its decision and order.<sup>33</sup>

9. We conclude that the Petitioners have not shown “extraordinary circumstances” warranting consideration of their untimely petition for reconsideration because they were not entitled to receive notice of the grant of Jonach’s application. The Petitioners argue that they were “persons affected by the action” within the meaning of Section 1.4(b)(5) of the Commission’s Rules because Jonach was required either to demonstrate that its interference contour would not overlap with the service area contour of the Petitioners’ Station WNVG529 or to obtain the Petitioners’ consent.<sup>34</sup> The pertinent notice provision, however, states that only parties to an adjudicatory proceeding are entitled to receive copies of rulings. Specifically, Section 0.445(a) of the Commission’s Rules<sup>35</sup> provides: “Adjudicatory opinions and orders of the Commission, or its staff acting on delegated authority, are mailed to the parties, and as part of the record, are available for inspection in accordance with §§ 0.453 and 0.455.” In this case, because there was no separate letter or order granting Jonach’s application, the pertinent document was the license. Given that neither the Petitioners nor any other party filed a timely objection to Jonach’s application, the

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<sup>27</sup> *Reuters v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d at 1091.

<sup>28</sup> *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *Reuters v. FCC*, 781 F.2d at 952; *Gardner v. FCC*, 530 F.2d at 1091.

<sup>29</sup> See *Gardner v. FCC*, 530 F.2d at 1091; citing *Radio Station KFH v. FCC*, 247 F.2d 570, 573 n.2 (D.C. Cir. 1957); *Albertson v. FCC*, 182 F.2d 397, 401 (D.C. Cir. 1950).

<sup>30</sup> See also *Adelphia Communications Corp., Order*, 12 FCC Rcd 10759, 10760 ¶ 4 (1997); *Eight Applications for Authority to Construct and Operate Multipoint Distribution Service Stations on the Channel 1 and 2, E, F, and H Group Channels at Various Transmitter Sites, Order*, 11 FCC Rcd 7008, ¶ 7 (1996).

<sup>31</sup> *Reuters Limited v. FCC*, 781 F.2d at 952.

<sup>32</sup> *Adelphia Communications Corp.*, 12 FCC Rcd at 10760 ¶ 4.

<sup>33</sup> See *Gardner*, 530 F.2d at 1091.

<sup>34</sup> Petition at 3, citing 47 C.F.R. § 90.187(b)(2).

<sup>35</sup> 47 C.F.R. § 0.445(a).

only party to the application proceeding was Jonach.<sup>36</sup> Although the Petitioners could have learned of the existence of Jonach's application and filed an objection prior to grant, they did not do so. Moreover, it is not customary for the Commission to send copies of authorizations issued pursuant to Section 90.187 to other licensees who did not participate in the application proceeding. Under these circumstances, the Petitioners have not met their burden of showing "extraordinary circumstances" that would give the Commission the authority to waive the statutory deadline for filing a petition for reconsideration.

10. Notwithstanding our denial of the reconsideration petition, we emphasize that, on our own motion, we are investigating the Petitioners' allegations. If we determine that our grant of Jonach's application was based on the submission of inaccurate information, we reserve the right to take appropriate action, including, but not limited to, the initiation of proceedings to modify<sup>37</sup> or revoke<sup>38</sup> Jonach's license for Station WPNX320.

11. *Conclusion.* For the reasons set forth above, we find no basis for reversing the Branch's decision. The Branch's action is warranted under the facts presented and consistent with Commission precedent and practice. The Petitioners have failed to demonstrate that extraordinary or unusual circumstances exist that would warrant us entertaining their untimely reconsideration petition. We therefore deny the Petitioner's reconsideration request.

12. *Ordering Clause.* Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration submitted by Atlantic Express Transportation Group, Inc., Winsale, Inc., and received on January 17, 2001, IS DENIED.

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<sup>36</sup> 47 C.F.R. § 1.4(b)(5) (example 7 illustrates that the "date of public notice commences on the day appearing on the license mailed to the applicant."). See Amendment of the Rules Regarding the Computation of Time, 2 FCC Rcd 7402, 7403 at ¶ 7 (1987).

<sup>37</sup> See 47 U.S.C. § 316.

<sup>38</sup> See 47 U.S.C. § 312(a)(2).

13. 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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