

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

In the Matter of)
Western Communications, Inc.) Reference No. 7110-19
Request for Waiver of Rule Section 1.949 to)
Reinstate License for 800 MHz Trunked)
Specialized Mobile Radio Service Station)
WNGC384 at Lead, South Dakota)

ORDER

Adopted: August 9, 2001

Released: August 10, 2001

By the Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. We have before us a Petition for Reconsideration filed July 24, 2000 by Nextel License Acquisition Corp. ("Nextel"). Nextel asks the Commercial Wireless Division to reconsider the June 26, 2000 decision of the Licensing and Technical Analysis Branch ("Branch") granting waiver relief to Western Communications, Inc. ("Western"). The Letter Decision authorized the late-filed reinstatement of Western's expired Specialized Mobile Radio Service ("SMR") license for station WNGC384 at Lead, South Dakota. For the reasons discussed below, we grant Nextel's Petition for Reconsideration, reverse the decision of the Branch, and deny Western's request for waiver and reinstatement.

2. The authorization for WNGC384 expired on August 24, 1999. Due to Western's failure to timely file a license renewal application, the license automatically terminated on the expiration date pursuant to Commission rules. On November 19, 1999, Western filed a request for a waiver of section 1.949(a) of the Commission's rules, and asked for renewal of the expired license ("Waiver Request"). In its Waiver Request, Western states that it did not receive a renewal notice. Additionally, Western states that loss of the license would be extremely hard on its customers and its business.

3. The Licensing and Technical Analysis Branch granted the Waiver Request on June 26, 2000. In its Letter Decision, the Branch stated that there was good cause to grant a waiver, based on the

1 On January 12, 2001, Western filed an Opposition to Nextel's Petition for Reconsideration. Western concurrently filed a Motion to Accept the Opposition, claiming that it did not receive its service copy of Nextel's Petition and did not learn of the Petition until January 8, 2001. We grant Western's request and accept its late-filed Opposition. Nextel filed a Reply to Western's Opposition on January 24, 2001.

2 See Letter from Ronald B. Fuhrman, for Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, to Raymond A. Kowalski, Counsel for Western Communications, Reference No. 7110-19 (June 26, 2000) ("Letter Decision").

3 47 C.F.R. § 1.955(a)(1) (1999).

4 47 C.F.R. § 1.949(a) (1999) (requires that renewal applications be filed prior to license expiration).

5 Waiver Request at 1.

6 Id.

fact that Western's station was "constructed, operational, and serving users."⁷ In addition, the Branch stated that denial of a waiver would "disrupt service to existing users and cause severe hardship" to those relying on Western's system.⁸

4. Nextel, the holder of the Economic Area license for BEA115, which includes Lead, South Dakota, filed the subject Petition for Reconsideration on July 24, 2000. In its Petition, Nextel argues that Western failed to demonstrate that it satisfied the Commission's requirements for a waiver of the rules.⁹ Nextel also argues that the recovered channels should automatically revert to Nextel, the holder of the Economic Area license.¹⁰

5. Upon reviewing the facts and circumstances in this matter, we believe that the Branch incorrectly granted Western's request for a waiver of section 1.949(a) of the Commission's rules. A waiver may be granted where the applicant demonstrates that: (a) the underlying purpose of the rule would be frustrated or not served by application to the present case, and that grant of the requested 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.¹¹ In its Waiver Request, Western does not address the underlying purpose of the rule or how the rule would be frustrated by its application. Western mentions its customers, but provides no showing that termination of service to these customers would leave them without service alternatives or result in loss of a unique service. Western also fails to show that any unique or unusual circumstances existed that would justify a waiver of the Commission's rules. Western's claim that it did not receive a renewal notice is unpersuasive. The Commission has repeatedly held that each licensee is solely responsible for knowing the term of its license and submitting a renewal application in a timely manner.¹² In similar instances, the Commission has denied requests to reinstate licenses that are the

⁷ *Letter Decision* at 1.

⁸ *Id.*

⁹ Petition for Reconsideration at 1.

¹⁰ *Id.* at 4.

¹¹ 47 C.F.R. § 1.925(b)(3) (1999). *See also* Biennial Regulatory Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, 13 FCC Rcd 21,027, 21,070-74 ¶¶ 95-100 (1998) ("*ULS Report and Order*"); Biennial Review—Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 11,476, 11,485 ¶ 22 (1999) ("*ULS Memorandum Opinion and Order*"). In the ULS Report and Order and Memorandum Opinion and Order, the Commission set forth its policy regarding treatment of late-filed renewal applications. Specifically, applicants that file renewal applications more than thirty days after the license expiration date may request that the license be renewed *nunc pro tunc*, but such requests will not be routinely granted, will be subject to stricter review, and also may be accompanied by enforcement action. In determining whether to grant a late-filed renewal application, the Commission takes into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.

¹² *See* Daniel Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, *Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21,944, ¶ 53 (1998) (holding that "[i]t is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license," and that "failure of a licensee to receive a [renewal form] from the Commission is no excuse for failure to file a renewal application"); Sierra Pacific Power Company, *Order*, DA 00-2922, ¶ 6 (rel. Jan. 3, 2001) (holding that "each licensee bears the exclusive responsibility of filing a timely renewal application"); Alameda-Contra Costa Transit District Private Land Mobile Stations KBY746, WFS916, and KM8643, *Order*, DA 00-2769, ¶ 10 (rel. Dec. 11, 2000) (holding that "[r]egardless of whether the renewal notices [are] received, each licensee is responsible for knowing the expiration date of its licenses and submitting a renewal of license application in a timely

(continued....)

subject of untimely filed renewal applications and inadequate waiver requests.¹³ Accordingly, we reverse the Branch decision and deny Western's request for grant of its late-filed renewal application for station WNGC384.

6. Under the Commission's rules, any recovered channels in the 800 MHz SMR service revert automatically to the holder of the Economic Area license within which such channels are included.¹⁴ Therefore, when the Western license expired on August 24, 1999, the five channels associated with call sign WNGC384 at 861-865.73750 MHz automatically reverted to Nextel, the holder of the Economic Area license.

7. 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 Nextel License Acquisition Corp. IS GRANTED.

8. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(f), and Section 1.931(a) of the Commission's rules, 47 C.F.R. § 1.931(a), Special Temporary Authority IS GRANTED *sua sponte* to Western Communications, Inc. to continue operations for 90 days or until Western is notified by Nextel that it is ready to provide service in the area previously served by Western, to transition, if necessary, its current subscribers using the facilities licensed under call sign WNGC384.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau

(...continued from previous page)

manner"); World Learning, *Order*, 15 FCC Rcd 23,871, ¶ 4 (2000) (holding that licensee "is solely responsible for filing a timely renewal application"); First National Bank of Berryville, *Order*, 15 FCC Rcd 19,693, ¶ 8 (2000) (holding that "a licensee's obligation to timely file a renewal application is not dependent upon the Commission sending a renewal notice to the licensee; rather, it is the responsibility of each licensee to renew its application prior to the expiration date of the license"); and Montana Power Company, *Order*, 14 FCC Rcd 21,114, ¶ 7 (1999) (holding that "it is the responsibility of each licensee to apply to renew its license prior to the license's expiration date").

¹³ See, e.g., Peacock's Radio and Wild's Computer Service, Inc., 21st Century Wireless Group, Inc., Request for Reinstatement of Specialized Mobile Radio System Call Sign WNWK964, Wabash, Arkansas, *Memorandum Opinion and Order*, FCC 01-213 (rel. Aug. 1, 2001) (upholding denial of untimely request for reinstatement of expired license); Anderson Communications, Request for Reinstatement of Specialized Mobile Radio System Call Sign WNQC571, Oxford, Mississippi, *Memorandum Opinion and Order*, FCC 01-214 (rel. Aug. 1, 2001) (upholding denial of untimely request for reinstatement of expired license); D/FW Communications Services, Inc., Request for Waiver and Application to Renew Trunked Business Station WPGW865, Dalls/Fort Worth, Texas, *Order on Reconsideration*, DA 01-1530 (rel. June 29, 2001) (upholding denial of a waiver request and dismissal of a late-filed renewal application).

¹⁴ 47 C.F.R. § 90.173(n) (1999).