

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

In the Matters of)	
)	
RANDY POWER d/b/a PROCOMM)	File No. 664325
)	
Licensee of Station WNXS420 in Litchfield Park,)	
Arizona, General Category Channel 854.0875)	
MHz, Renewal of License)	
)	
FRANYA MARZEC d/b/a PARADISE)	
VALLEY)	File Nos. 614054, 630913
)	
Licensee of Station WPBN444 in Phoenix,)	
Arizona, General Category Channel 854.0875)	
MHz)	

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 2001

Released: November 6, 2001

By the Chief, Commercial Wireless Division:

I. INTRODUCTION

1. We have before us a Partial Petition for Reconsideration filed by Franya Marzec d/b/a Paradise Valley Communications (Marzec),¹ and a supplement to that petition² seeking reconsideration of a letter decision by the Licensing and Technical Analysis Branch (Branch), Commercial Wireless Division, Wireless Telecommunications Bureau.³ We also have before us a Petition for Reconsideration filed by Randy Power d/b/a Procomm (Power) seeking reconsideration of the same Branch decision.⁴ For the reasons set forth below, we grant Marzec’s petition in part, dismiss Marzec’s supplemental petition, and dismiss Power’s petition.

II. BACKGROUND

2. On March 23, 1992, Power was granted a conventional General Category license under

¹ Partial Petition for Reconsideration, filed January 3, 2000 (Marzec Petition).

² Supplemental Petition for Reconsideration, filed March 27, 2000 (Supplemental Marzec Petition).

³ Letter from Terry Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, to Delaney M. DiStefano, Esq., and Russell Taylor, Esq., dated December 3, 1999 (*Licensing Branch Letter*).

⁴ Petition for Reconsideration, filed January 3, 2000 (Power Petition).

call sign WNXS420 for operation on 854.0875 MHz in Litchfield Park, Arizona.⁵ Under the Commission's licensing rules in effect at the time of the grant, conventional General Category licensees were required to construct and load their stations within eight months of the original grant date.⁶ The loading rules also specified that General Category channels were available for licensing on a shared basis unless they were loaded with 70 mobiles, at which point further licensing of the channel in the same geographic area was not allowed.⁷ At the time Power's license was granted, the loading rules required separate end-user licenses for mobile units associated with SMR systems.⁸ In October 1992, however, the Commission eliminated separate end-user licensing for SMR systems and required all mobiles to be identified on the base station license of the SMR provider.⁹

3. During the eight-month construction period for WNXS420, which ended on November 23, 1992, no end-user licenses were sought or authorized for the station.¹⁰ When the rules were changed to eliminate separate end-user licensing for SMR, Power did not identify any mobiles on his base station license as being associated with the station and,¹¹ at the end of its construction period, Power's authorization continued to reflect no mobiles associated with the station.

4. Marzec is the licensee of co-channel SMR Station WPBN444, located in Phoenix, Arizona and licensed for operation on 854.0875 MHz. On January 20, 1993, after the construction deadline for Power's station, the Licensing Division of the former Private Radio Bureau granted Marzec a license for Station WPBN444. Marzec timely constructed Station WPBN444 and loaded it with 70 mobiles for exclusive status.

5. On March 31, 1994, Power filed a modification application to add mobile units on its station.¹² In 1998, Power applied to renew the license for WNXS420, and the Licensing Branch granted the renewal application on July 29, 1998. Marzec filed a petition for reconsideration of the grant of the renewal application, contending that Power's license had already cancelled for non-operation because no mobiles were associated with the station.

6. On December 3, 1999, the Licensing Branch issued the *Licensing Branch Letter* addressing the various applications and petitions filed by Power and Marzec. First, the Branch denied Marzec's petition seeking reconsideration of the renewal of Power's license, stating that despite the absence of mobiles listed on Power's license, the license was valid because Power could maintain the operational

⁵ *Licensing Branch Letter* at 1.

⁶ 47 CFR § 90.633.

⁷ 47 CFR § 90.633(b).

⁸ 47 CFR § 90.135(a)(5) (1991). SMR licensees could provide service to licensed third party end-users, whose mobiles then counted towards the licensee's loading of the channel. The end-user licensing rules, which were applicable to SMR General Category licensees, no longer apply to SMR licensees in the 800 MHz band. *See* In the Matter of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End-Users Specialized Mobile Radio Systems, *Memorandum Opinion and Order*, 7 FCC Rcd 5558 (1992) (*End-User Order*).

⁹ *See End-User Order*, 7 FCC Rcd at 5559.

¹⁰ *Licensing Branch Letter* at 2.

¹¹ *Id.*

¹² *Id.*

status of the station based on use of the station by roamers.¹³ Second, the Branch dismissed Power's 1994 modification application to add mobiles as defective because it lacked a coordination statement for an application in the 800 MHz General Category pool, as required by section 90.175(c) of the Commission's rules.¹⁴ The application also did not contain a co-channel concurrence statement from Marzec, the co-channel licensee.¹⁵ Third, the Licensing Branch denied Marzec's modification application seeking to trunk 854.0875 MHz.¹⁶

7. Both Marzec and Power have filed petitions for reconsideration of certain decisions in the *Licensing Branch Letter*. In the Marzec Petition, Marzec seeks reconsideration of the finding that Power's Station WNXS420 could be deemed operational based solely on service to roamers.¹⁷ Marzec contends the Branch's decision is inconsistent with the Commission's decision in *Abraham Communication, Inc.*, which involved the cancellation of a conventional SMR license for non-operation.¹⁸ In its supplemental petition for reconsideration, Marzec also challenges the Branch's denial of its application requesting the trunking of 854.0875 MHz.

8. Power seeks reconsideration of the original grant to Marzec on January 10, 1993. Power did not seek reconsideration, however, of the Branch's dismissal of its 1994 modification application to add mobiles to WNXS420.

III. DISCUSSION

9. We grant Marzec's Petition and reverse the Licensing Branch's decision that Power's station remained operational solely for the purpose of serving roamers. Under the rules in effect at the time, a licensee was required to construct and operate an 800 MHz General Category station within eight months of the grant.¹⁹ If the licensee did not meet that deadline, the license automatically cancelled.²⁰ Moreover, in order to be considered "operational," a conventional SMR system must have had at least one associated mobile operating on the channel.²¹

10. As noted above, from the time of the initial license grant to Power through the elimination of end-user licensing in October 1992, there were no licensed end-users on Power's system. Following the elimination of end-user licensing, Power did not list any mobiles as operating on the system as required by the Commission's rules.²² Thus, from the initial license grant through the conclusion of the construction

¹³ *See Report and Order*, PR Docket 85-302, FCC 86-232, 51 Fed. Reg. 18794 (1986).

¹⁴ 47 C.F.R. § 90.175(c).

¹⁵ *Licensing Branch Letter* at 2; 47 C.F.R. § 90.621(b)(4).

¹⁶ *Id.* at 4.

¹⁷ Marzec Petition at 2.

¹⁸ *Abraham Communications, Inc., Memorandum Opinion and Order*, FCC 96-324 (rel. Sept. 18, 1996)(*Abraham*).

¹⁹ 47 CFR § 90.633(c).

²⁰ 47 CFR § 90.633(d).

²¹ *Id.*

²² 47 CFR § 90.135(a)(5).

period for WNXS420, November 23, 1992, Power had no mobiles associated with the station.²³ Subsequently, the Commission granted the co-channel license to Marzec for station WPBN444, which gained exclusive rights to the channel by loading it with 70 mobiles, and thus precluded Power from further operation. Based on these facts, we conclude that Power's license cancelled automatically because it was not operational with at least one mobile unit by the applicable construction deadline.

11. We agree with Marzec that the Licensing Branch erred in treating Power's station as operational based on the possibility that it could provide service to roamers. The Branch's conclusion is inconsistent with section 90.633(d), which requires a system to have at least one "associated" mobile to be considered operational. In addition, the Branch's conclusion is inconsistent with the Commission's decision in *Abraham*,²⁴ and its more recent decisions in *Nationwide Radio Communications, Inc.*²⁵ and *A-1-A Repeaters*.²⁶ In each of these cases, the Commission upheld the cancellation of a conventional SMR license for non-operation because the licensee failed to license any end-users on its system and a subsequent licensee fully loaded the channel to obtain exclusivity.

12. With respect to the remaining petitions before us, we dismiss Power's petition for lack of standing because Power's license had automatically cancelled on November 23, 1992, several years before Power filed his petition.²⁷ We also note that Power's petition seeking reconsideration of the grant to Marzec would be considered untimely because he did not seek reconsideration of Marzec's initial grant until six years after the initial grant. Section 1.106(b) of the Commission's rules requires that petitions for reconsideration be filed within 30 days after the Commission's action.²⁸

13. Marzec's Supplemental Petition raises new issues regarding the trunking of 854.0875 MHz. Therefore, we dismiss Marzec's Supplemental Petition as untimely because it was filed after the 30-day period for reconsideration of the *Licensing Branch Letter*.²⁹

IV. ORDERING CLAUSES

14. 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) and 405, and sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, the Partial Petition for Reconsideration filed by Franya Marzec IS GRANTED.

15. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the

²³ Power did not attempt to add any mobiles to its system until March 1994 -- well over a year after its construction period had expired.

²⁴ *Abraham* at ¶8.

²⁵ In the Matter of Nationwide Radio Communications, Inc., *Memorandum Opinion and Order*, FCC 01-112 (rel. April 4, 2001).

²⁶ In the Matter of A-1-A Repeaters, *Memorandum Opinion and Order*, 16 FCC Rcd 9751, 9752 (2001).

²⁷ See In the Matter of Mobile Relay Associates, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 4320 (2001) (licensee relinquished its right to file an application for review when its license had already cancelled).

²⁸ See 47 C.F.R. § 1.106(f), *see also* 47 C.F.R. § 1.4(b)(5).

²⁹ 47 C.F.R. § 1.106(f).

Supplemental Petition for Reconsideration filed by Franya Marzec IS DISMISSED.

16. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition for Reconsideration filed by Randy Power IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze, Chief
Commercial Wireless Division
Wireless Telecommunications Bureau