

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

In the Matter of)
SOUTHWEST CENTRAL DISPATCH) FCC File No. 0000427005
Request for Waiver of Section 101.81 of the)
Commission's Rules)

ORDER

Adopted: November 5, 2001

Released: November 8, 2001

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

I. INTRODUCTION

1. Southwest Central Dispatch (Southwest Central) operates a Fixed Microwave Services (FMS) station in the 2 GHz band and inadvertently allowed the license for the station to expire. As a result, Southwest Central filed an application for a new license for the same FMS operations. In connection with its application, Southwest Central requests a waiver of the Commission's rules that would otherwise result in the authorization of the station on a secondary basis. For the reasons set forth below, we deny Southwest Central's request to authorize the station with primary status.

II. BACKGROUND

2. The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services. To this end, the Commission has adopted certain transition rules. In doing so, the Commission balanced the needs of incumbent FMS licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.

1Letter from William D. Shanley, Director, Southwest Central Dispatch, to Susan Mickley, Microwave Section, Wireless Telecommunications Bureau, Federal Communications Commission, dated July 12, 2001 (filed July 13, 2001) (Primary Letter).

2FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000427005, Letter of Explanation (filed April 13, 2001 and amended July 24, 2001).

3Letter from William D. Shanley, Director, Southwest Central Dispatch, to Susan Mickley, Microwave Section, Wireless Telecommunications Bureau, Federal Communications Commission, dated July 12, 2001 (filed July 24, 2001) (Waiver Request).

4Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) (ET First Report and Order).

5See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public, and most conducive to the introduction of new services. ET First Report and Order, 7 FCC Rcd at 6886 ¶ 5.

6ET First Report and Order, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule (continued....)

Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁷ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁸ In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.⁹ Most minor modifications of FMS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the ET licensee.¹⁰ The result is that while incumbent FMS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status.

3. Southwest Central, a governmental cooperation association authorized by state statute, is a multi-jurisdictional communications center which provides primary emergency radio communications and dispatch services for eighteen police, fire, and emergency medical service agencies throughout portions of Du Page, Cook, and Will Counties, Illinois.¹¹ It operates a 2 GHz FMS system to transmit data and emergency communications, including primary emergency radio, burglary, invasion and fire alarms within this dispatch system.¹² Due to administrative error, Southwest Central failed to renew the license for Station WNES989, Willow Brook, Illinois, in a timely manner,¹³ and, thus, the license automatically expired on August 5, 1998. By the time Southwest Central realized that the license had expired, the thirty-day grace period that the rules then allowed for reinstatement without re-licensing had run.¹⁴ On April 13, 2001, Southwest Central filed an application for a new license for the station.¹⁵

4. On July 24, 2001, Southwest Central filed a request for waiver of the Commission's rules that provide that new FMS stations in the 2 GHz band will be authorized on a secondary basis to ET licenses. It indicates that it did not timely renew the license because it did not receive a renewal notice from the Commission.¹⁶ Southwest Central also states that, in the future, it will review its licenses "at least annually, if not more often to determine what licenses are about to expire and, when necessary,

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Making, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

⁷47 C.F.R. §§ 101.69(b), 101.79(a). *See also ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁸*See* 47 C.F.R. §§ 101.69(a), 101.71-101.77

⁹47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and they are not protected from interference from primary operations. *Cost Sharing and First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. *Id.*

¹⁰47 C.F.R. § 101.81.

¹¹Primary Letter at 1.

¹²*Id.* at 1-2.

¹³*See id.* at 1.

¹⁴Under the rules in effect when the license expired, petitions for reinstatement had to be filed within 30 days of the license's expiration date. *See* 47 C.F.R. § 101.65(b) (1998).

¹⁵FCC 601 Main Form: FCC Application for Wireless Telecommunications Bureau Radio Service Authorization, File Number: 0000427005 (filed April 13, 2001).

¹⁶Primary Letter at 1.

ensure that the appropriate renewal forms will be filed within ninety (90) days of the expiration regardless of whether or not it receives any notice of upcoming expiration from the FCC.”¹⁷

III. DISCUSSION

5. In this case, while the station at issue was originally authorized with primary status, Southwest Central allowed its license to operate the station to expire. Southwest Central requests a waiver of the rules so that its new license for the station can be accorded primary status. We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁸ For the reasons set forth below, we conclude that grant of the requested waiver is not warranted under the circumstances presented.

6. Southwest Central requests a waiver of the rule that would otherwise result in the authorization of the new station on a secondary basis apparently on the grounds that its failure to renew the license for Station WNES989 was inadvertent, as the Commission failed to provide it with timely notice of when the station license was scheduled to expire.¹⁹ We conclude that an inadvertent failure to renew a license in a timely manner does not constitute a unique or unusual circumstance that renders application of the 2 GHz licensing rules inequitable, unduly burdensome, contrary to the public interest, or leaves the applicant with no reasonable alternative.²⁰ As the Commission has made clear in other instances, each licensee bears the exclusive responsibility for filing a timely renewal application.²¹

7. The Commission’s policy regarding licenses for which no timely renewal application is filed is as follows: if a renewal application is late-filed up to thirty days after the license expiration date in any Wireless Radio Service, and the application is otherwise sufficient under the Commission’s rules, the Commission will grant the renewal *nunc pro tunc*; applicants who file renewal applications more than thirty days after license expiration may also request renewal *nunc pro tunc*, but such requests will not be routinely granted, will be subjected to stricter review, and may be accompanied by enforcement action, including more significant fines or forfeitures.²² In determining whether to grant a late-filed renewal application, we take into consideration all of the facts and circumstances, including the length of the delay in filing, the reasons for the failure to file timely, the potential consequences to the public if the license should terminate, and the performance record of the licensee.²³ Southwest Central’s current application

¹⁷Letter from William D. Shanley, Director, Central Southwest Dispatch, to Scot Stone, Federal Communications Commission, dated Oct. 4, 2001.

¹⁸47 C.F.R. § 1.925(b)(3).

¹⁹Primary Letter at 1.

²⁰See *Sierra Pacific Power Company, Order*, 16 FCC Rcd 188, 190-91 ¶ 6 (WTB PSPWD 2001) (*Sierra Pacific*); *Plumas-Sierra Rural Electric Cooperative, Order*, 15 FCC Rcd 5572, 5575 ¶ 9 (WTB PSPWD 2000) (*Plumas-Sierra*); *Duke Power Company, Order*, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999) (*Duke Power*).

²¹See *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 11476, 11485 ¶ 21 (1999) (*ULS MO&O*); *Amendment of Parts 1 and 90 of the Commission’s Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, Report and Order*, PR Docket No. 90-481, 6 FCC 7297, 7301 n.41 (1991).

²²*ULS MO&O*, 14 FCC Rcd at 11485-86 ¶ 22.

²³*Id.* at 11486 ¶ 22.

was filed almost three years after the license expired. Given that Southwest Central bore the responsibility for timely renewing its licenses whether or not it received a renewal notice from the Commission, we conclude that grant of its request -- which effectively would be a renewal *nunc pro tunc* -- would not be appropriate under the circumstances presented herein.²⁴

IV. CONCLUSION

8. Based on the record in this proceeding, we conclude that Southwest Central has failed to make a sufficient showing that grant of a waiver of Section 101.81 of the Commission's Rules is warranted. We therefore deny its request for a waiver of Section 101.81 of the Commission's Rules. We note, however, that a denial of the waiver request does not mean that Southwest Central may not operate the subject station; rather, assuming the application is otherwise proper, Southwest Central's operation of such station will be accorded secondary status.

V. ORDERING CLAUSES

9. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Sections 1.925 and 101.69 of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.69, the Request for Waiver of Southwest Central Dispatch, filed July 24, 2001, IS DENIED.

10. IT IS FURTHER ORDERED that application FCC File No. 0000427005 SHALL BE REFERRED to the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division for processing consistent with this *Order* and the applicable Commission Rules.

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

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau

²⁴See *Sierra Pacific*, 16 FCC Rcd at 190-91 ¶ 6; *Plumas-Sierra*, 15 FCC Rcd at 5575-76 ¶ 9; *Duke Power*, 14 FCC Rcd at 19434-35 ¶ 8. This matter is unlike the case presented in Monroe County, *Order on Reconsideration*, DA 01-2135, ¶ 6 (WTB PSPWD rel. Sept. 14, 2001), where the failure to renew the licenses on time was caused by a confluence of factors in addition to the failure to receive a renewal notice, and the license filed its renewal applications only 33 days after the expiration date, and adopted a considerable review procedure to ensure that the situation would not recur. Further, we note that while Southwest Central does not contend that the underlying purpose of the rule would not be served or would be frustrated by applying it in this case, other 2 GHz band licensees in similar circumstances have made such arguments. Specifically, applicants that inadvertently failed to renew their licenses argued that re-licensing the facilities on a primary basis would not frustrate the 2 GHz licensing rules because it would neither add "new" stations nor increase relocation costs beyond the level contemplated by the Commission when it reallocated the band. See *Plumas-Sierra*, 15 FCC Rcd at 5574 ¶ 6; *Duke Power*, 14 FCC Rcd at 19433 ¶ 5. We rejected that argument, and concluded that the purpose of the rules would in fact be frustrated by a waiver, because the 2 GHz rules are intended not only to ensure that the cost to relocate FMS incumbents does not escalate, but also to clear the 2 GHz spectrum by allowing FMS stations to lose primary status as those stations change. See *Plumas-Sierra*, 15 FCC Rcd at 5574-75 ¶ 7; *Duke Power*, 14 FCC Rcd at 19433-34 ¶ 6.