

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

In the Matter of Applications of)
COUNTY OF WARREN)
For Private Fixed Microwave Service Stations) File Nos. 0000431513, 000431534,
and Requests for Waiver of Section 101.81 of the) 0000431548, 0000432481
Commission's Rules)

ORDER

Adopted: November 7, 2001

Released: November 13, 2001

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

I. INTRODUCTION

1. The County of Warren (Warren County) operates four fixed microwave service (FMS) stations in the 2 GHz band and inadvertently allowed the licenses for the stations to expire. Warren County has now filed new applications for the same stations. In connection with its applications, Warren County requests waivers of the Commission's rules that would otherwise result in the authorization of the stations on a secondary basis. For the reasons set forth below, we deny Warren County's request to authorize the stations 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

1The station call signs are 1) WNEJ701 (Lebanon, Ohio), 2) WNEJ702 (Warren County, Ohio), 3) WNEJ703 (Franklin, Ohio), and 4) WNEJ704 (Warren County, Ohio).

2FCC 601 Main Forms: FCC Applications for Wireless Telecommunications Bureau Radio Service Authorization, File Numbers: 0000431513, 0000431534, 000431548; and 0000432481, Waiver Letters (filed July 18, 2001; Aug. 16, 2001; Aug. 16, 2001; and, Aug. 16, 2001, respectively) (Waiver Requests).

3FCC 601 Main Forms: FCC Applications for Wireless Telecommunications Bureau Radio Service Authorization, File Numbers 0000431513; 0000431534; 0000431548; 0000432481 (filed Apr. 18, 2001; Apr. 18, 2001; Apr. 18, 2001; Apr. 19, 2001, respectively).

4Waiver Requests.

5Redevelopment 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).

6See 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.

services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.⁷ 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.⁸ 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.⁹ 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.¹⁰ 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.¹¹ 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. Warren County failed to renew the licenses for the subject stations in a timely manner, apparently due to administrative error, and, thus, the licenses automatically expired between September 22, 1999 and July 12, 2000.¹² On April 18 and 19, 2001, Warren County filed applications for new licenses for the subject stations. On July 18 and August 16, 2001, Warren County filed requests for waiver of the Commission's rules that provide that new FMS stations in the 2 GHz band are authorized on a secondary basis to ET licensees.¹³

III. DISCUSSION

4. In this case, while the stations at issue were originally authorized with primary status, Warren County allowed its licenses to operate the stations to expire. Warren County requests a waiver of the rules so that its new licenses for the stations 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.¹⁴ For the reasons set forth below, we conclude that grant of the requested waiver is not warranted under the circumstances presented.

⁷*ET 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 Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

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

⁹See 47 C.F.R. §§ 101.69(a), 101.71-101.77

¹⁰47 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.*

¹¹47 C.F.R. § 101.81.

¹²Warren County's licenses for the subject stations expired on the following dates: 1) WNEJ701: September 22, 1999; 2) WNEJ702: July 12, 2000; 3) WNEJ703: July 12, 2000; and 4) WNEJ704: July 12, 2000.

¹³Waiver Requests.

¹⁴47 C.F.R. § 1.925(b)(3).

5. Significantly, Warren County fails to provide a detailed explanation as to why the licenses were allowed to expire or why a waiver grant is warranted under the circumstances presented. Thus, it appears that the licenses expired as a result of Warren County's inadvertent failure to renew the licenses in a timely manner. As we have done previously in similar cases, 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 band licensing rules inequitable, unduly burdensome, contrary to the public interest, or leaves the applicant with no reasonable alternative.¹⁵ As the Commission has made clear in other instances, each licensee bears the exclusive responsibility for filing a timely renewal application.¹⁶ Thus, we find that Warren County has failed to make a sufficient demonstration that grant of a waiver is warranted.

6. Further, the Commission's policy regarding licenses for which no timely renewal application is filed is as follows: renewal applications that are filed within thirty days of the expiration of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under the Commission's Rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.¹⁷ Applicants who file renewal applications more than thirty days after the license expiration may also 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, including more significant fines or forfeitures.¹⁸ 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 timely file, the potential consequences to the public if the license should terminate, and the performance record of the licensee.¹⁹ Warren County's current applications were filed between nine and eighteen months after the respective licenses expired. Given that Warren County bore the responsibility for timely renewing its licenses whether or not it received a renewal notice from the Commission, and the Commission's policy that renewal applications filed more than thirty days after expiration will not be granted routinely, we decline to waive routinely the Commission's rules to grant primary status to 2 GHz FMS stations when the licenses for those stations have expired because of a licensee's failure to renew such licenses in a timely manner.²⁰

¹⁵See, e.g., *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*).

¹⁶See 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*, WT Docket No. 98-20, 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 Rcd 7297, 7301 n.41 (1991).

¹⁷See *ULS MO&O*, 14 FCC Rcd at 11485-86 ¶ 22.

¹⁸See *id.*

¹⁹See *id.*

²⁰See *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. In addition, we note that while Warren County 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, e.g., *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

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IV. CONCLUSION

7. Based on the record in this proceeding, we conclude that Warren County has failed to demonstrate sufficiently that grant of a waiver of Section 101.81 of the Commission's Rules is warranted under the circumstances presented. 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 Warren County may not operate the subject station; rather, assuming the application is otherwise proper, Warren County's operation of such stations will be accorded secondary status.

V. ORDERING CLAUSES

8. 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 Requests for Waiver of Warren County, filed July 18, 2001 and August 16, 2001, ARE DENIED.

9. IT IS FURTHER ORDERED that applications FCC File Nos. 0000431513, 0000431534, 0000431548, 0000432481 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.

10. 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

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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.