

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

In the Matter of
WISCONSIN ELECTRIC POWER COMPANY
Request for Waiver of Section 101.81 of the
Commission's Rules
File No. 0000487105

ORDER

Adopted: December 17, 2001

Released: December 20, 2001

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

I. INTRODUCTION

1. On June 12, 2001, Wisconsin Electric Power Company (Wisconsin Electric) filed a request for waiver of the Commission's Rules to allow it to retain primary status for its license to operate Fixed Microwave Service (FMS) Station WNEY242, Paris, Wisconsin. For reasons set forth below, we deny the waiver request.

II. BACKGROUND

2. In 1992, the Commission reallocated portions of the 2 GHz band from FMS to emerging technology (ET) systems, including the personal communications services (PCS). The Commission intended to reaccommodate the FMS licensees in a manner that would be most advantageous to incumbent users, least disruptive to the public, and most conducive to the introduction of new services. Accordingly, first, to preserve the availability of the existing vacant 2 GHz spectrum, the Commission decided to license all new facilities in the 2 GHz band on a secondary basis. Second, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permitted 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 were to relocate to other spectrum. Third, the Commission restricted the type of modifications and extensions FMS licensees could make to their 2 GHz systems and retain primary status. Fourth, the Commission provided ET licensees with the option

1Wisconsin Electric Power Company Request for Waiver of Section 101.81 of the FCC's Regulations (filed June 12, 2001) (Waiver Request).

2Redevelopment 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 R&O); see also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 1542 (1992) (ET NPRM).

3ET First R&O, 7 FCC Rcd at 6886-87 ¶ 5.

4Id. at 6891-92 ¶ 31; ET NPRM, 7 FCC Rcd at 1545 ¶ 23. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees) and are not protected from interference from primary operations.

5ET First R&O, 7 FCC Rcd at 6890-91 ¶¶ 22-29; ET NPRM, 7 FCC Rcd at 1545 ¶ 24.

6ET First R&O, 7 FCC Rcd at 6891-92 ¶ 31.

of requiring the FMS incumbents to relocate sooner and paying the additional costs caused by the earlier relocation.⁷ One practical effect of these rules was that incumbent FMS licensees that were authorized on a primary basis would have the cost of relocating to other bands paid for by the new ET licensees if the ET licensees force them to relocate. On the other hand, ET licensees are under no obligation to relocate 2 GHz band links that were authorized on a secondary basis.

3. On May 14, 1992, the Microwave Branch, Licensing Division of the former Private Radio Bureau (Microwave Branch) issued a *Public Notice* stating that while new facilities in the 2 GHz band would be given secondary status, secondary status would not be accorded to those stations licensed prior to January 16, 1992, as to which the FMS licensee made certain minor or technical modifications of their facilities.⁸ The *Public Notice* further indicated that secondary status would not be accorded in situations where additional links were required to complete a communications network or where new facilities and/or frequencies were operationally connected to a network system licensed prior to January 16, 1992, where the applicant made a valid showing of its need for the new facilities.⁹ Later that year, the Commission affirmed this approach.¹⁰ As a result, licensees of existing 2 GHz band facilities could make certain modifications and minor extensions and retain primary status, but major extensions or expansions would result in a station being accorded secondary status unless a special showing of need was made to justify primary status.¹¹

4. On October 12, 1995, the Commission sought comment on whether it should continue to grant any 2 GHz FMS applications on a primary basis.¹² The Commission stated that to the extent practicable it would continue to apply the existing rules governing primary and secondary status to pending applications, but that subsequently filed applications would be granted primary status only for modifications that would not add to the relocation costs of PCS licensees.¹³ Thus, the Commission set forth a limited list of technical changes that would be granted primary status and stated that any other modifications would be permitted only on a secondary basis, unless the incumbent made a special showing of need to justify primary status and established that the modifications would not add to the relocation costs of PCS licensees.¹⁴

5. On April 25, 1996, the Commission adopted the current regulations regarding the licensing of FMS systems in the 2 GHz band,¹⁵ which went into effect August 1, 1996.¹⁶ As a result, major modifications and extensions are licensed on a secondary basis, and primary status is granted only

⁷*Id.* at 6890 ¶ 24; *ET NPRM*, 7 FCC Rcd at 1545 ¶ 26.

⁸Two Gigahertz Fixed Microwave Licensing Policy, *Public Notice*, Mimeo No. 23115 (May 14, 1992).

⁹*Id.*

¹⁰Redevelopment 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, 6891-92 ¶ 31 (1992).

¹¹*Id.*

¹²Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *Notice of Proposed Rule Making*, 11 FCC Rcd 1923, 1925 ¶ 2 (1995) (*Cost Sharing NPRM*).

¹³*Id.* at 1926 ¶ 4.

¹⁴*Id.*

¹⁵Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Dkt. No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-89 (*Cost Sharing First Report and Order*); 47 C.F.R. § 101.81.

¹⁶61 Fed. Reg. 29679, 29680, 29695 (1996).

for a limited number of technical changes.¹⁷ All other minor modifications render the modified license secondary unless the FMS licensee justifies primary status and the modification does not add to the relocation costs to be paid by the new ET licensees.¹⁸

6. Wisconsin Electric provides electricity to 1,006,013 residences and businesses in Wisconsin and Michigan, and natural gas and steam to a combined 398,958 customers.¹⁹ Wisconsin Electric states that it must maintain a reliable communications network to maintain its utility operations and recover quickly from calamities that sometimes occur in the everyday functioning of its utility operations.²⁰ One part of its communications network is a 2 GHz band microwave path between Stations WNEY242, Paris, Wisconsin and WNEY241, Kenosha, Wisconsin.²¹ The 2 GHz band microwave hop carries traffic in support of remote monitoring and control of an electric substation and combustion turbine facility in Paris, Wisconsin.²²

7. In 1992, in order to meet growing demand for electricity, Wisconsin Electric constructed a gas turbine facility on the premises of the authorized site of Station WNEY242, and relocated the station to another site approximately 500 feet away. Wisconsin Electric failed, however, to file the appropriate modification application with the Commission prior to such relocation.²³ After discovering the resulting coordinate discrepancy while reviewing its FCC tower registrations, on November 7, 2001 Wisconsin Electric filed a modification application and waiver request to allow grant of the modification on a primary basis.²⁴ On May 22, 2001, Wisconsin Electric withdrew that application. On June 12, 2001, Wisconsin Electric filed another application and waiver request.²⁵

III. DISCUSSION

8. As noted above, Section 101.81 of the Commission's Rules provides that, after April 26, 1996, all major modifications and extensions to 2 GHz FMS systems will be authorized only on a secondary basis.²⁶ As an initial matter, Wisconsin Electric argues that Station WNEY242 should retain its primary status because the modification occurred prior to April 25, 1996.²⁷ In short, Wisconsin Electric asserts that, as the modification occurred prior to April 25, 1996, it is exempt from the requirements of Section 101.81 of the Commission's Rules that would compel the Commission to grant Wisconsin Electric's application for license modification for Station WNEY242 with secondary status. We disagree. Section 101.81 governs all 2 GHz license modification applications granted after the rule took effect, regardless of when the application was filed or when the modification was actually implemented.²⁸

¹⁷*Cost Sharing First Report and Order*, 11 FCC Rcd at 8868 ¶ 86; 47 C.F.R. § 101.81.

¹⁸47 C.F.R. § 101.81.

¹⁹Waiver Request at 1.

²⁰*See id.* at 2.

²¹*Id.*

²²*Id.*

²³*Id.* at 3.

²⁴FCC File No. 0000254070 (filed November 7, 2000).

²⁵The June 12, 2001 application and waiver request are both identical to those Wisconsin Electric submitted on November 7, 2000.

²⁶47 C.F.R. § 101.81.

²⁷Waiver Request at 3.

²⁸*Cost Sharing First Report and Order*, 11 FCC Rcd at 8868 ¶ 88. *See also* *The Beeper People, Order*, 16 FCC Rcd 18536, 18539 ¶ 8 (WTB PSPWD 2001).

9. Wisconsin Electric's relocation of Station WNEY242, from its former location to its present one, an approximate distance of 500 feet,²⁹ constitutes a major modification.³⁰ Without a waiver of Section 101.81, Wisconsin Electric's modified license would be granted only on a secondary basis.³¹ We may grant a request for waiver of a rule if the requesting party shows (i) the underlying purpose of the rule 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 factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³²

10. Wisconsin Electric argues that the underlying purpose of Section 101.81 would not be frustrated if we were to grant the waiver request, because the cost to an ET licensee to relocate would be the same at the old or the new location.³³ We disagree. As we have stated previously, the goals of the 2 GHz band licensing rules are not only to limit or "lock in" relocation costs, as Wisconsin Electric argues,³⁴ but also to clear the 2 GHz spectrum by allowing FMS stations to lose primary status as those stations change.³⁵ In declining to expand the licensing policy beyond these contours, the Commission stated that limiting primary site grants is necessary to protect the interests of PCS (and other ET) licensees.³⁶ Moreover, the rules themselves demonstrate that limiting relocation costs are not the only purpose the rules serve. For example, all major modifications result in a 2 GHz FMS station being accorded secondary status, regardless of the effect on relocation costs.³⁷ Further, licensees that make certain minor modifications must affirmatively justify primary status, not just show that the modifications will not add to relocation costs in order to retain primary status.³⁸ Thus, we believe that the Commission has decided that the effect on relocation costs is a relevant decisional factor only when licensees propose minor modifications, and not when they propose major modifications.³⁹

11. Next, Wisconsin Electric argues that we should grant the waiver request in view of the unique or unusual circumstances of the instant case.⁴⁰ Specifically, it suggests that application of the rule would be inequitable because the loss of primary status would compel Wisconsin Electric, rather than an ET licensee, to bear the cost of relocating Station WNEY242. Again, we disagree. We see no inequity in distinguishing between a properly authorized pre-1996 major modification and a pre-1996 major modification for which authorization was not requested until 2001. We expect FCC licensees to provide

²⁹Waiver Request at 3.

³⁰47 C.F.R. § 1.929(d)(1)(i).

³¹47 C.F.R. § 101.81.

³²47 C.F.R. § 1.925(b)(3).

³³Waiver Request at 5.

³⁴*Id.*

³⁵Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188, 191 ¶ 7 (WTB PSPWD 2001); Plumas-Sierra Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572, 5574-75 ¶ 7 (WTB PSPWD 2000) (*Plumas-Sierra*); Duke Power Company, *Order*, 14 FCC Rcd 19431, 19433-34 ¶ 6 (WTB PSPWD 1999).

³⁶*Cost Sharing First Report and Order*, 11 FCC Rcd at 8868-69 ¶ 88.

³⁷47 C.F.R. § 101.81.

³⁸*Plumas-Sierra*, 15 FCC Rcd at 5574-75 ¶ 7.

³⁹*See e.g.*, Illinois Valley Cellular RSA 2, Inc., *Order*, 15 FCC Rcd 14819, 14821 ¶ 6 (WTB PSPWD 2000); Cybertel RSA Cellular, L.P., *Order*, 15 FCC Rcd 5577, 5579 ¶ 5 (WTB PSPWD 2000).

⁴⁰Waiver Request at 5.

all technical information regarding its station's facilities in a timely manner so as to demonstrate compliance with all the technical requirements of the Commission's Rules.⁴¹ Further, if prior FCC approval is required before certain technical changes are made, we expect FCC licensees to obtain such approval in advance of making the changes rather than post-implementation thereof. In addition, correct information is necessary to the frequency coordination process.⁴² Having neglected to file a timely modification application, Wisconsin Electric is rightly subject to the rules governing post-1996 modifications.

IV. CONCLUSION

12. Based on the record before us, we conclude that Wisconsin Electric has failed to demonstrate that grant of a waiver of Section 101.81 of the Commission's Rules is warranted. We therefore deny its request for waiver of Section 101.81 of the Commission's Rules. We note, however, that a denial of the waiver requests does not mean that Wisconsin Electric may not operate the subject station; rather, assuming the application is otherwise proper, Wisconsin Electric's authorization to operate the station will be accorded secondary status.⁴³

V. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925, 1.945, 101.69, and 101.81 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.945, 101.69, 101.81, the Request for Waiver filed by Western Electric on June 12, 2001, IS DENIED.

14. IT IS FURTHERED ORDERED that application FCC File No. 0000487105 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.

⁴¹See, e.g., 47 C.F.R. § 101.21.

⁴²See Revision of Part 21 of the Commission's Rules, *Report and Order*, CC Docket No. 86-128, 2 FCC Rcd 5713, 5715 ¶ 16 (1987); Frequency Coordination in the Private Land Mobile Radio Services, *Report and Order*, PR Docket No. 83-737, 103 FCC 2d 1093, 1106 ¶ 25, 1112 ¶ 38 (1986).

⁴³Our decision herein addresses only Wisconsin Electric's waiver requests, and is taken without prejudice to any enforcement action with respect to unauthorized operation under the modified parameters. We also note that any licensee seeking Commission approval to modify a FMS station must also seek Commission approval to modify the license(s) of any station(s) to which the modified station transmit, if any corresponding changes were made to the station(s) to ensure that the stations line up accurately. Additionally, each license must reflect correct information regarding any station(s) to which it transmits. Thus, it would appear that Wisconsin Electric must seek to modify its license for Station WNEY241.

15. 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
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