

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

In the Matter of)
)
Enogex, Inc.) FCC File No. 0000090958
)
Station WNEZ248,)
Thomas, Oklahoma)

ORDER

Adopted: March 8, 2001

Released: March 12, 2001

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

I. INTRODUCTION

1. On February 25, 2000, Enogex, Inc. (Enogex) submitted an application for authorization in the 928/959 MHz Multiple Address Systems (MAS) band,¹ accompanied by a Request for Reinstatement of License and Waiver of Freeze on New Applications (Enogex Request). Enogex seeks reinstatement of its license for Station WNEZ248, which expired on November 24, 1999, and asks that the Commission waive the current suspension of the acceptance of new applications for authorization in the 928/959 MHz MAS band. For the reasons set forth herein, we deny the Enogex Request and dismiss the associated application.

II. BACKGROUND

2. On February 27, 1997, the Commission initiated a comprehensive examination of the MAS service, seeking comment on a variety of issues, including the current and potential uses of MAS spectrum, modifications designed to streamline MAS licensing procedures to better accommodate such uses, spectrum allotment, and licensing.² In the *Notice*, the Commission proposed to designate the 928/959 MHz bands for subscriber-based services, and temporarily suspended the acceptance and processing of MAS applications for new licenses for the 928/959 MHz band.³ The Commission concluded that a suspension of the acceptance of applications in this band would permit the orderly and effective resolution of the issues in the proceeding and noted that applications for new licenses might limit the effectiveness of the decisions made and standards developed in the proceeding.⁴ In the subsequent *Report and Order*, the Commission determined that a geographic area licensing approach would best accommodate the current and future uses of the 928/959 MHz MAS band.⁵ The Commission also concluded that maintaining the

¹ Specifically, Enogex seeks authorization to operate on 928.99375 MHz and 959.99375 MHz.

² See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Notice of Proposed Rulemaking*, WT Docket No. 97-81, 12 FCC Rcd 7973 (1997) (*Notice*).

³ *Id.* at 8003-04 ¶¶ 68-71.

⁴ *Id.*

freeze in this band would be in the public interest, because it would enable orderly and effective implementation of the decisions made in the proceeding and would allow the effective implementation of MAS auction procedures.⁶

3. As of July 1, 1999, Tejas Gas, L.L.C. (Tejas Gas) completed a transaction involving the transfer of control of several licensed facilities, including Station WNEZ248, to Enogex without first seeking Commission approval.⁷ Upon discovering the oversight, Enogex submitted applications seeking authorization for transfer of control of the licenses for thirty fixed microwave and land mobile radio stations on September 3, 1999.⁸ Additionally, on November 8, 1999, the Licensing and Technical Analysis Branch of the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division granted special temporary authority (STA) to operate Station WNEZ248 on frequencies in the 928/959 MHz MAS band until May 8, 2000.⁹

4. The license for Station WNEZ248 expired on November 24, 1999. Enogex filed the subject application and request on February 25, 2000. Given that the Commission no longer provides for reinstatement applications in the Wireless Services,¹⁰ an application that is filed more than thirty days after the expiration date of the license, without a waiver, is considered either a late-filed renewal application or a "new" application.¹¹ Enogex recognizes that a waiver of the MAS application freeze is required for

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⁵ See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, WT Docket No. 97-81, 15 FCC Rcd 11956 (2000) (*Report and Order*). We note that a *Further Notice of Proposed Rulemaking* was released in this proceeding on July 1, 1999, to assess the effects of the 1997 Balanced Budget Act on the proposals in the *Notice*. See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Further Notice of Proposed Rulemaking*, WT Docket No. 97-81, 14 FCC Rcd 10744 (1999) (*Further Notice*). The suspension of the 928/959 MHz band was not affected by the *Further Notice*.

⁶ *MAS Report and Order*, 15 FCC Rcd 11956 ¶¶ 111-115. The Commission also noted that this approach is consistent with the approach taken in other services where the Commission has transitioned to geographic area licensing and competitive bidding procedures.

⁷ Enogex Request at 1; Enogex STA Request at 1. Station WNEZ248 is part of a transaction where Enogex purchased certain assets of Transok, Inc. from Tejas Gas. Hence, Enogex submitted the subject application and request for waiver of the Commission's Rules on behalf of Transok.

⁸ Enogex Request at 1. The applications to transfer control were approved on May 12, 2000.

⁹ *Id.* The current STA is effective through May 30, 2001. Grant of the STA and our decision herein concerning the waiver request are without prejudice to any enforcement action that may be taken with respect to the unauthorized transfer of control.

¹⁰ See 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*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21070-74 ¶¶ 95-100 (1998) (*ULS Report and Order*); 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, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476, 11484-86 ¶¶ 20-22 (1999) (*ULS Memorandum Opinion and Order*).

¹¹ A license expires automatically on the date specified on the individual license. 47 C.F.R. § 1.955(a)(1). See also *ULS Report and Order*, 13 FCC Rcd at 21073-74 ¶ 100.

authorization to operate in the subject frequency band.¹² Enogex requests that the Commission find it in the public interest to reinstate the license for Station WNEZ248 on its previously authorized frequency, and permit the operation of the Station after May 8, 2000.¹³

III. DISCUSSION

5. In the *ULS Report and Order* and *ULS Memorandum Opinion and Order*, the Commission set forth its current policy regarding treatment of late-filed renewal applications.¹⁴ 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.¹⁵ 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.¹⁶

6. Upon reviewing the facts and circumstances in this matter, we do not believe that license reinstatement for Station WNEZ248 is warranted. Enogex states that upon the grant of the STA on November 8, 1999, a comprehensive review of its facilities acquired from Tejas Gas was conducted when it discovered that the license for Station WNEZ248 expired.¹⁷ Additionally, Enogex asserts that the public interest militates in favor of a Commission grant of its reinstatement request because the facilities associated with the Station are critical to the safe operation of its facilities.¹⁸ We find Enogex's arguments to be unpersuasive. Enogex emphasizes the importance of its services to the public interest, but we note that Enogex's application for authorization was filed approximately three months after the expiration of its license. We believe that this three-month time lapse is a substantial delay in filing for reasons that seem to be attributed to nothing other than inadvertence. In similar instances, we have previously denied requests to reinstate licenses that are the subject of untimely filed renewal applications.¹⁹ Moreover, while we recognize that this station may serve certain safety interests, we nonetheless believe that there is spectrum contained in the other MAS bands (*i.e.*, 928/952/956 MHz and the 932/941 MHz MAS bands) that is currently available for licensing. Accordingly, we deny Enogex's request for grant of its late-filed renewal application for Station WNEZ248.

¹² Enogex Request at 2.

¹³ *Id.* at 3.

¹⁴ See *ULS Report and Order*, 13 FCC Rcd at 21070-74 ¶¶ 95-100; *ULS Memorandum Opinion and Order*, 14 FCC Rcd at 11484-86 ¶¶ 20-22.

¹⁵ *ULS Memorandum Opinion and Order*, 14 FCC Rcd at 11485-86 ¶ 22.

¹⁶ *Id.*

¹⁷ Enogex Request at 1-2.

¹⁸ *Id.*

¹⁹ See, *e.g.*, World Learning, Inc., *Order*, DA 00-2719 (WTB PSPWD rel. Dec. 4, 2000); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693 (WTB PSPWD 2000).

7. As a result of the delay in filing its request for renewal of the license for Station WNEZ248 and our decision to deny its request, Enogex's application is considered a "new" application.²⁰ Hence, Enogex must seek a waiver to the pending application freeze on new applications for the 928/959 MHz MAS band.²¹ Section 1.925 of the Rules states that we may grant a waiver if it is shown that: (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (b) application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²² For the reasons set forth below, we conclude that a grant of the requested waiver is not warranted and therefore deny Enogex's request for waiver of the application freeze, as well.

8. Under the waiver standard, we first analyze whether granting Enogex a waiver in this instance, would, in any way, frustrate the purpose of the MAS application freeze or hinder the purpose from being served, and whether the public interest would be served by the waiver. Enogex states that it seeks to continue the identical operation of the station, and does not seek to expand service or in any other way modify the previously licensed facilities.²³ Enogex also avers that the public interest would be served by granting its request due to the public safety services provided by the station, which Enogex uses to facilitate the operations of petroleum pipelines.²⁴ Enogex therefore contends that the first element of the waiver standard is satisfied.²⁵

9. We believe that strict enforcement of the MAS application freeze in this instance is consistent with the purpose of the freeze. The MAS application freeze was implemented by the Commission to make and execute decisions regarding future MAS licensing schemes in an orderly manner.²⁶ Specifically, the *Report and Order* changed the licensing scheme in the 928/959 MHz band from site-based licensing to geographic area licensing.²⁷ In addition, the *Report and Order* included provisions to protect incumbent licensees in their established service areas while encouraging efficient spectrum use.²⁸ To the extent that a site is unserved, the Commission indicated that the area is to be served by a geographic area licensee.²⁹ We believe that to reinstate an expired license at this juncture would be inconsistent with this licensing approach. As the Commission recently noted, grant of a waiver request

²⁰ See *supra* ¶ 4.

²¹ *Id.*

²² 47 C.F.R. § 1.925(b)(3).

²³ Enogex Request at 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *Report and Order*, 15 FCC Rcd at 12003 ¶¶ 111-115; *Further Notice*, 14 FCC Rcd at 10761-62 ¶¶ 28-31; *Notice*, 12 FCC Rcd at 8003-04 ¶¶ 68-71.

²⁷ *Report and Order*, 15 FCC Rcd at 11974-75 ¶¶ 46-48.

²⁸ *Id.*

²⁹ See 47 C.F.R. § 101.1331 (provides that frequencies associated with incumbent authorizations in the 928/959 MHz bands that have cancelled automatically or otherwise been recovered by the Commission will revert to the geographic area licensee).

received after the Commission has announced that particular spectrum will be auctioned and instituted a freeze can undermine the Commission's spectrum management goals.³⁰ We find that altering the execution of the Commission's decisions in the MAS proceeding in this regard would in fact contravene the public interest.

10. With regard to the second of the two standards for granting a waiver, the request must show unique or unusual circumstances that render application of the licensing rules inequitable, unduly burdensome or contrary to the public interest. Enogex states that upon the grant of its STA on November 8, 1999, it conducted a comprehensive examination of its acquired FCC-licensed facilities and learned that the license for Station WNEZ248 expired on November 24, 1999.³¹ Enogex also states that it has no other reasonable alternatives that will not require unduly burdensome actions.³² It appears that Enogex overlooked the timely renewing of its license. Previously, we have not granted waiver requests in instances involving the inadvertent failure to renew a license in a timely manner in connection with a merger or reorganization.³³ In light of this precedent, we do not believe that Enogex has shown that its case presents unusual or unique circumstances such that it is entitled to a waiver of the MAS application freeze. In addition, as stated earlier, Enogex has an alternative in that it may apply for frequencies in the 928/952/956 MHz MAS band or the twenty channels that are set aside for public safety and/or private internal use in the 932/941 MHz MAS band, which are not subject to an application freeze.³⁴

IV. CONCLUSION AND ORDERING CLAUSES

11. For the foregoing reasons, we conclude that Enogex has not justified a waiver of the suspension of the filing of applications for the 928/959 MHz MAS band. Denying the waiver is consistent with and furthers the purpose of the freeze. In addition, Enogex has not demonstrated that its case presents unique or unusual circumstances.

12. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request filed by Enogex, Inc. on February 25, 2000, IS DENIED and the associated application, FCC File No. 0000090958, IS DISMISSED.

³⁰ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Report and Order and Notice of Proposed Rule Making*, WT Docket No. 99-87, FCC 00-403, ¶¶ 133-135 (rel. Nov. 20, 2000) (in reviewing Section 337 waiver requests, the Commission stated that a variety of public interest factors will be taken into consideration, including the effect that grant of the request may have on future auctions).

³¹ Enogex Request at 1.

³² *Id.* at 3.

³³ See Northwest Missouri Cellular, *Order*, 15 FCC Rcd 14762 ¶ 9 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999); Metrocall USA, Inc., *Order on Reconsideration*, 15 FCC Rcd 18259, 18262 n.24 (WTB PSPWD PRB 2000).

³⁴ See *supra* ¶ 6.

13. 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
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