

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

In the Matter of)
)
ELECTRONIC ENGINEERING COMPANY)
) File No. D049390
For Permit and Modification of License for)
Facilities to Operate on 929.7625 MHz at West)
Des Moines, IA, et al.)
)
)

ORDER ON RECONSIDERATION

Adopted: March 9, 2001

Released: March 12, 2001

By the Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. This Order denies a Petition for Further Reconsideration filed by Electronic Engineering Company (EEC)1 of an order issued on October 14, 19992 by the Commercial Wireless Division (Division), Wireless Telecommunications Bureau. The Division Order denied EEC's petition for reconsideration of the dismissal3 of EEC's application by the Division's Licensing and Technical Analysis Branch (Branch).

2. Background. On August 8, 1996, EEC filed an application proposing to change the location of two sites that would operate on 929.7625 MHz at West Des Moines, Iowa, et al. under call sign WPHT 261. The application was filed without coordination from the frequency coordinator because the separation requirements under Section 90.495(b) of the rules had not been met.4 The Dismissal Order stated that, under the Paging Second Report and Order,5 PageMart II, Inc. (PageMart) was a nationwide

1 EEC Petition for Further Reconsideration, filed November 12, 1999 (Petition for Further Reconsideration).

2 Electronic Engineering Co., Order on Reconsideration, 15 FCC Rcd 9933 (CWD October 14, 1999) (Division Order).

3 Letter from Terry L. Fishel, Deputy Chief, Licensing and Technical Analysis Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Hill & Welch, File No. D049390, Reply No. 7110-18, dated September 11, 1998 (Dismissal Order).

4 47 C.F.R. § 90.495(b) (1995); EEC Application, File No. D049390, filed August 8, 1996, FCC Form 600, Sch. D, line D14 and attached statement to the FCC from Heather McCormack, Personal Communications Industry Association, dated July 31, 1996.

5 Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 2732 (1997) (Second Report and Order), modified by Memorandum Opinion and Order on Reconsideration and Third Report (continued....)

licensee on 929.7625 MHz because it had conditionally qualified for nationwide exclusivity. The *Dismissal Order* also found that issues concerning PageMart's exclusivity had been addressed in a separate proceeding, where the Commission had denied an application for review by EEC relating to PageMart's use of frequency 929.7625 MHz.⁶ As a result, EEC's application was dismissed.

3. In denying EEC's petition for reconsideration of the *Dismissal Order*, the *Division Order* stated that EEC's application was filed without coordination because the proposed sites did not satisfy the separation requirements of Section 90.495(b) of the rules, and upheld the dismissal of the application because of EEC's failure to satisfy the frequency coordination requirement of section 90.175(f) of the rules.⁷ The *Division Order* further stated that EEC's application was filed on August 8, 1996, after the July 31, 1996 filing deadline established in the *Paging Second Report and Order*.⁸ The *Division Order* provided that a Petition for Revocation of 929.7625 MHz Exclusivity Authorization and Petition for Revocation of Licenses⁹ filed by EEC would be dealt with separately.

4. PageMart opposes EEC's Petition for Further Reconsideration on the ground that the petition is repetitious and procedurally deficient under the Commission's rules and therefore is subject to dismissal.¹⁰ EEC replies that its Petition for Further Reconsideration addresses matters that appeared for the first time in the *Division Order*.¹¹

5. *Discussion.* EEC claims that the *Division Order* abandoned the reasons to dismiss EEC's application that are set forth in the *Dismissal Order*.¹² This argument lacks merit. In its petition for reconsideration of the *Dismissal Letter*, EEC questioned the finding of PageMart's nationwide exclusivity by arguing that its own application had been frequency coordinated.¹³ The *Division Order* responded that EEC failed to satisfy the frequency coordination requirement under section 90.175(f) of the rules. Moreover, as stated in the *Dismissal Order*, PageMart's nationwide exclusivity was established in the *Second Report and Order* and in the order concerning PageMart's exclusivity on 929.7625 MHz.¹⁴ To the
(Continued from previous page) _____
and Order, 14 FCC Rcd 10030 (1999) (*Third Report and Order*), review denied by *Benkelman Telephone Co. v. FCC*, 220 F.3d 601 (D.C. Cir. 2000).

⁶ See *Electrical Engineering Co. and PageMart II, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 3819 (1997), *aff'd*, *Electronic Engineering Co. v. FCC*, 140 F.3d 1045 (D.C. Cir.), *cert. denied*, 525 U.S. 932 (1998).

⁷ 47 C.F.R. § 90.175(f) (1995).

⁸ See *Second Report and Order*, 12 FCC Rcd at 2737, ¶ 2.

⁹ Petition for Revocation of 929.7625 MHz Exclusivity Authorization and Petition for Revocation of Licenses, PageMart II, Inc. – Authorization to Provide Nationwide Exclusive Service on 929.7625 MHz (filed September 26, 1997) (Revocation Petition).

¹⁰ PageMart Opposition to Petition for Further Reconsideration, filed November 24, 1999 (Opposition).

¹¹ EEC Reply to Opposition to Petition for Further Reconsideration, filed December 6, 1999 (Reply).

¹² Petition for Further Reconsideration at 1 n.2.

¹³ EEC Petition for Reconsideration, filed October 28, 1998 at 1.

¹⁴ See *supra* notes 6-7.

extent EEC seeks to reargue these issues, it offers no new facts or arguments warranting reconsideration on this issue, and we find its allegation to be repetitive and subject to dismissal.¹⁵

6. EEC also argues that the frequency coordination statement required in section 90.175(f) of the rules¹⁶ is a collection of information that required approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA).¹⁷ EEC claims that no approval was ever obtained for section 90.175(f) or its predecessor section 90.175(c) and that its application cannot be dismissed based on a failure to obtain coordination pursuant to an unapproved information collection.¹⁸

7. We disagree. Section 90.175 provides in relevant part that “each application for a new frequency assignment . . . must include a showing of frequency coordination as set forth below. . . . (c) For frequencies in the 929-930 MHz band. A statement from the coordinator recommending the most appropriate frequency.”¹⁹ Section 90.175(c) simply states a requirement of a showing that had to be included in an application for a new frequency assignment. That requirement was embodied in a block, for the frequency coordinator’s use only, on FCC Form 600, Schedule D, Item D14, the appropriate form for new frequency assignments in 1996 when EEC filed its application.²⁰ The instructions to Schedule D indicated that this item is to be “completed by the appropriate certified frequency coordinators for those applicants who are required to comply with the frequency coordination requirements.” These instructions echo the requirements of section 90.175(c). FCC Form 600 was approved by OMB and assigned OMB Control No. 3060-0623.²¹ Thus, the requirement that an applicant obtain a statement from the frequency coordinator set forth in section 90.175(c), included in FCC Form 600, Schedule D, Item D14, received appropriate approval from OMB under the PRA.

8. EEC further argues that the dates on its stamp-receipted application and fee check prove

¹⁵ See 47 C.F.R. § 1.106(k)(3).

¹⁶ 47 C.F.R. § 90.175(f). Section 90.175(c), the predecessor of Section 90.175(f), was in effect when EEC's application was filed. We therefore will address EEC's argument in the context of Section 90.175(c). Compare 47 C.F.R. § 90.175(c) (1995) with 47 C.F.R. § 90.175(f) (1997) (two rules are identical).

¹⁷ Petition for Further Reconsideration at 2-3. Section 3512(b) of the PRA, 44 U.S.C. § 3512(b), permits PRA issues to be raised at any time during a pending administrative proceeding.

¹⁸ See 44 U.S.C. § 3512(a) (“no person shall be subject to any penalty for failing to comply with a collection of information” lacking a valid OMB control number).

¹⁹ 47 C.F.R. § 90.175(c) (1995).

²⁰ See 47 C.F.R. § 90.119(a)(1) and (3) (1995) (“Form 600 shall be used to apply . . . (1) [f]or new base, fixed, or mobile station authorizations governed by this part . . . (4) [f]or modification . . . of an existing authorization.”).

²¹ See *Public Information Collection Approved by Office of Management and Budget*, 61 Fed. Reg. 12072 (1996) (publishing notice of OMB approval of amendment of FCC Form 600 that was in effect when EEC filed its application); *Notice of Office of Management and Budget Action: 3060-0623* (Dec. 9, 1994); 47 C.F.R. § 0.408 (1995 and 1996) (listing FCC Form 600 as among the Commission’s approved information collections).

that its application was timely filed on July 31, 1996 and not on August 8, 1996.²² However, these items establish that the fee check, which had to accompany the application,²³ was not deposited until August 9, 1996, a date that corresponds with the August 8, 1996 receipt date on the application. Under Section 1.116(a), (a)(2) of the rules, absent timely filed fees, an application is subject to dismissal and the date of resubmittal with the correct fee will be considered the date of filing.²⁴ We find that the filing date of August 8, 1996 is confirmed by the deposit date of the fee check and thus we do not accept EEC's argument that its application was timely filed on July 31, 1996.

9. EEC further argues that even if its application is deemed to have been filed after July 31, 1996, dismissal was not required under the *Second Report and Order* and that certain applications that were filed after July 31, 1996 have been granted.²⁵ The public notice relating to the interim licensing rules stated that the Wireless Telecommunications Bureau intended to process initial applications filed after July 31, 1996.²⁶ However, the notice also cautioned that "the extent to which post-July 31 applications are processable may be affected by the timing of a final order in the proceeding and the transition to new licensing rules."²⁷ The *Second Report and Order* directed that all applications filed after July 31, 1996 would be dismissed (other than applications for nationwide or shared channels).²⁸ In affirming that determination, the Commission stated that it did "not believe that any applicants could have reasonably relied on our processing applications filed after . . . [July 31, 1996]."²⁹ Thus, even though certain paging applications filed after July 31, 1996 may have been processed, all parties were "on notice of the possibility that their applications might be dismissed . . ."³⁰ Indeed, numerous applications filed after July 31, 1996 were dismissed.³¹ This possibility of dismissal also applied to EEC's application and we accordingly reject its argument.³²

10. We do not agree with EEC that issues it has raised in the Revocation Petition should be

²² EEC has submitted a copy of its application that bears two receipt date stamps, July 31, 1996 and August 8, 1996. The fee check that is attached to the application bears a deposit date stamp of August 9, 1996. See Petition for Further Reconsideration at 3-4, Attachments.

²³ See 47 C.F.R. § 0.401(b) (1995) (requiring that correct fee be attached to the application and delivered to lockbox bank); 47 C.F.R. § 90.127(a) (1995) (applications requiring frequency coordination and fees shall first be sent to frequency coordinator).

²⁴ 47 C.F.R. §§ 1.1116(a), (a)(2) (1995).

²⁵ Petition for Further Reconsideration at 4-7.

²⁶ *Public Notice*, 11 FCC Rcd 7032 (1996).

²⁷ *Id.*

²⁸ *Second Report and Order*, 12 FCC Rcd at 2737, ¶ 2.

²⁹ *Third Report and Order*, 14 FCC Rcd at 10039, ¶ 9.

³⁰ *Id.*, 14 FCC Rcd at 10043, ¶ 13.

³¹ See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Order*, 14 FCC Rcd 700, 701, ¶ 7 (CWD 1998).

addressed in the context of this proceeding involving EEC's application. We affirm the decision to consider that matter separately.

11. Accordingly, IT IS ORDERED that, pursuant to authority delegated by sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and by sections 0.331 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.106, the petition for further reconsideration filed by Electronic Engineering Company on November 12, 1999 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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