

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

In the Matter of)
COUNTY OF DELAWARE)
For Private Fixed Microwave Service Stations)
And Requests for Waiver of Section 101.81 of the)
Commission's Rules)
FCC File Nos. 0000945657, 0000945658

ORDER

Adopted: November 4, 2002

Released: November 6, 2002

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

1. Introduction. The County of Delaware (Delaware County) operates two fixed microwave service (FMS) stations in the 2 GHz band, and inadvertently allowed the licenses to expire. On June 28, 2002, Delaware County filed applications for new authorizations to operate the subject stations. In connection with its applications, Delaware County requests waivers of Section 101.81 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 Delaware County's Waiver Requests.

2. Background. 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 and the need to provide ET licensees with a stable environment in which to plan and implement new services. Additionally, in adopting the transition rules, the Commission sought to prevent ET licensees from bearing any additional costs of relocating FMS licensees. 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 certain length of time, by the end of which the incumbents are to relocate to other spectrum. ET licensees have

1 The call signs associated with the former licenses were 1) WNTG618 (Andes, New York); and 2) WNEQ841 (Delhi, New York).

2 FCC File Nos. 0000945657 and 0000945658 (Applications) and associated Waiver Requests (Waiver Requests).

3 Redevelopment 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).

4 See 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.

5 ET First Report and Order, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30.

6 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).

7 47 C.F.R. §§ 101.69(b), 101.79(a). See also ET First Report and Order, 7 FCC Rcd at 6886 ¶ 5.

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. Delaware County failed to file applications to renew its licenses for Stations WNTG618 and WNEQ841. Thus, the licenses expired by their terms on September 29, 2000. On June 28, 2002, Delaware County filed new applications for new licenses to authorize the continued operation of the subject stations.¹¹ Delaware County concurrently filed the Waiver Requests seeking grant of a 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 licenses.¹²

4. *Discussion.* In this case, while the stations at issue were originally authorized with primary status, Delaware County allowed its licenses to operate the stations to expire. Delaware 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.¹³ For the reasons set forth below, we conclude that grant of the requested waiver is not warranted under the circumstances presented.

5. Significantly, Delaware County fails to provide any explanation as to why the licenses were allowed to expire, other than to state that it did not receive a renewal notice from the Commission.¹⁴ Our records indicate that renewal reminders were mailed to Delaware County.¹⁵ Moreover, a licensee's obligation to file timely a renewal application is not dependent on the Commission sending a renewal notice.¹⁶ Each licensee bears the exclusive responsibility for filing a timely renewal application.¹⁷ We

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

⁹ 47 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.*

¹⁰ 47 C.F.R. § 101.81.

¹¹ Applications. Delaware County later amended the applications on August 2, 2002 and August 3, 2002, respectively.

¹² Waiver Requests.

¹³ 47 C.F.R. § 1.925(b)(3).

¹⁴ Waiver Requests.

¹⁵ See Reference Nos. 317117 (WNTG618) and 317086 (WNEQ841), Renewal Reminder letters sent on July 2, 2000. The letters were addressed to County of Delaware, R. R. 1 Box 85D, Hamden, NY 13782.

¹⁶ See, e.g., First National Bank of Berryville, *Order*, 15 FCC Rcd 19693, 19695 ¶ 8 (WTB PSWD 2000) (citing Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate Development and the Use of the Universal Licensing System in the Wireless Telecommunications Services, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21071 ¶ 96 (1998)).

have previously determined 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.¹⁸ In addition, the Commission has determined that a licensee will not be afforded special consideration when the licensee fails to file a timely renewal application solely because it engages in public safety activities.¹⁹ Delaware County also fails to provide a sufficient reason as to why a waiver grant is warranted under the circumstances presented.²⁰ The Waiver Requests contain general statements that Delaware County retain primary status “for financial reasons [because the] financial impact to the taxpayers of the county to buy new radio equipment to correct this error [failure to timely renew the license] would be great.”²¹ Delaware County also volunteers that grant of the waiver is warranted as its “public safety system . . . has been in place for many years . . . and has served the constituents of Delaware County for many years.”²² Aside from these statements, Delaware County offers no further discussion. Such statements are an insufficient showing that a waiver is warranted. Thus, we find that Delaware County has failed to make a sufficient demonstration that grant of a waiver is warranted.²³

6. *Conclusion.* Based on the record in this proceeding, we conclude that Delaware County has failed to demonstrate that grant of a waiver of Section 101.81 of the Commission’s Rules is warranted under the circumstances presented. We therefore deny its requests for a waiver for Section 101.81 of the Commission’s Rules.

7. 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 of Delaware County for waiver of Section 101.81 of the Commission’s Rules, filed June 28, 2002, ARE DENIED.

8. IT IS FURTHERED ORDERED that applications FCC File Nos. 0000945657 and 0000945658 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.

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¹⁷ See 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); 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) (*PLMR R&O*).

¹⁸ See, e.g., Commonwealth of Kentucky, *Order*, 17 FCC Rcd 16538, 16540 ¶ 5 (WTB PSPWD 2002) (citing County of Warren, *Order*, 16 FCC Rcd 20149, 20151 ¶ 5 (WTB PSPWD 2001); Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188, 190-91 ¶ 6 (WTB PSPWD 2001); Plumas-Sierra Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572, 5575 ¶ 9 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999)).

¹⁹ See, e.g., *PLMR R&O*, 6 FCC Rcd at 7301 ¶ 20.

²⁰ See Waiver Requests.

²¹ *Id.*

²² *Id.*

²³ See, e.g., County of Stanislaus, *Order*, 16 FCC Rcd 21956, 21958 ¶ 5 (WTB PSPWD 2001).

9. 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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