

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

In the Matter of)
)
VSS ENTERPRISES, LLC)
)
Licensee of Station KNNF731, Las Vegas, Nevada)

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 2003

Released: April 4, 2003

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

1. *Introduction.* On June 8, 2001, VSS Enterprises, LLC (VSS) filed a petition for reconsideration of a decision by the Public Safety and Private Wireless Division (Division), Licensing and Technical Analysis Branch (Branch) denying VSS's request to correct its license for trunked Business Station KNNF731. For the reasons stated below, we deny the petition for reconsideration in part. In addition, on our own motion, we initiate a proceeding to modify VSS's license to remove frequency pair 899/938.4125 MHz.

2. *Background.* In 1997, the FCC consented to and granted an assignment/modification application to assign the license for Station KNNF731, Las Vegas, Nevada, from Gold Coast Hotel and Casino to Showboat Operations, Inc. (Showboat), and to relocate the transmitter. While the modified license correctly listed the transmitter's new street address, there was a typographical error with respect to the geographic coordinates. Specifically, the requested latitude was 36-09-19 North, but the modified license listed the latitude as 39-09-19 North, a difference of approximately two hundred miles. The error resulted in the frequencies assigned to Station KNNF731 – namely, 898/937.4500 MHz, 899/938.4125 MHz, and 899/938.4250 MHz -- appearing to be unassigned in the Las Vegas area. In July 2000, the FCC consented to the assignment of the license for Station KNNF731 from Showboat to VSS.

3. On October 4, 2000, the FCC granted ReadyMix, Inc. (ReadyMix) a license to operate Station WPRI751, Las Vegas, Nevada, on frequency pair 899/938.4125 MHz, at a site approximately six miles from the actual site of Station KNNF731. On March 5, 2001, VSS filed an informal petition requesting that the FCC correct the latitude listed for Station KNNF731, and rescind or modify ReadyMix's license for Station WPRI751.¹ The Branch dismissed the request on May 9, 2001, on the grounds that Section 1.106 of the Commission's Rules² requires that petitions for reconsideration be filed within thirty days of the action for which reconsideration is sought. VSS, however, had filed its request well beyond thirty days after both issuance of the modified license for its Station KNNF731 and the grant of the license for

¹ Letter dated March 2, 2001 from Suzanne E. Rogers, Esq., counsel for VSS, to Kelly Lawver, Wireless Telecommunications Bureau.

² 47 C.F.R. § 1.106.

Station WPRI751 to ReadyMix.³ On June 8, 2001, VSS filed a petition for reconsideration of the Branch's decision dismissing its informal request.⁴

4. On September 20, 2001, VSS filed an application to modify its license for Station KNNF731 to correct the latitude.⁵ On January 22, 2002, the Branch granted VSS's modification application. On February 8, 2002, the Industrial Telecommunications Association, Inc. (ITA) requested rescission of the grant.⁶ ITA argued that the grant was improper with respect to frequency pair 899/938.4125 MHz because VSS's requested location is too close to the authorized site of ReadyMix's Station WPRI751.⁷

5. On December 2, 2002, the Division sent a letter to ITA, which coordinated ReadyMix's application for Station WPRI751, and the Personal Communications Industry Association (PCIA), which coordinated VSS's application for Station KNNF731.⁸ The Division asked the coordinators, pursuant to Sections 90.173, 90.175, and 90.176(h) of the Commission's Rules,⁹ to determine whether the two stations could coexist at their current locations without unacceptable interference resulting, and, if not, what modification(s) of either or both licenses would minimize or eliminate such interference, with the least impact on the operations of the licensee(s).¹⁰ On December 20, 2002, PCIA responded that additional time was needed to determine whether the two stations could coexist, because VSS had not been fully utilizing frequency pair 899/938.4125 MHz.¹¹ PCIA also stated that VSS was willing to compromise on its authorized technical parameters in order to reach an equitable solution to the matter,¹² but that developing such a solution would require "real world testing."¹³ On February 13, 2003, ITA informed the Division that no testing had taken place, and that VSS had commenced full-power full-time operations on frequency pair 899/938.4125 MHz, resulting in substantial interference to ReadyMix's

³ See Letter dated May 9, 2001 from Mary Shultz, Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, to Suzanne E. Rogers, Esq., counsel for VSS.

⁴ VSS Petition for Reconsideration (filed June 8, 2001) (VSS Petition). In a previous order, we dismissed that portion of the VSS Petition that related to frequency pairs 898/937.4500 MHz and 899/938.4250 MHz. See Sunset Bus and Commercial, Inc., Order, 18 FCC Rcd 1915, 1917 ¶ 6 (WTB PSPWD 2003) (*VSS-Sunset Order*). The petition remains pending only with respect to frequency pair 899/938.4125 MHz.

⁵ FCC File No. 0000598897 (filed Sept. 20, 2001, amended Oct. 4, 2001 and Jan. 15, 2002).

⁶ Letter from Ronald G. Franklin, Director, Spectrum Operations and Analysis, ITA, to Mary Shultz, Federal Communications Commission (received Feb. 8, 2002) (ITA Request).

⁷ *Id.* at 1-2. ITA also challenged grant of the modification application with respect to frequency pairs 898/937.4500 MHz, 899/938.4250 MHz, and 896/935.8875 MHz (which was added to VSS's authorization pursuant to the modification application). The issues regarding those frequency pairs have been resolved. See *VSS-Sunset Order*, 18 FCC Rcd at 1917 ¶ 6; Industrial Telecommunications Association, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 1919, 1920 ¶ 2 (WTB PSPWD 2003) (*VSS-AAR Order*). Consequently, we dismissed the ITA Request, but stated that the issues relating to frequency pair 899/938.4125 MHz would be resolved in a separate proceeding. *VSS-AAR Order*, 18 FCC Rcd at 1920 n.3; see also *VSS-Sunset Order*, 18 FCC Rcd at 1916 n.7.

⁸ Letter dated Dec. 2, 2002 from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, to Industrial Telecommunications Association and Personal Communications Industry Association (Division Letter).

⁹ 47 C.F.R. §§ 90.173, 90.175, 90.176(h).

¹⁰ Division Letter at 1-2.

¹¹ Letter dated Dec. 20, 2002 from Don Andrew, Personal Communications Industry Association, to D'wana R. Terry, Chief, Public Safety and Private Wireless Division (PCIA Letter).

¹² *Id.* at 1; see also VSS Petition at 8 ("VSS will offer whatever assistance it reasonably can to mitigate any problems caused to ReadyMix").

¹³ PCIA Letter at 1.

operations.¹⁴ ITA reiterated its request that VSS's authorization to use frequency pair 899/938.4125 MHz be rescinded.¹⁵

6. *Discussion.* VSS argues that the Branch should not have dismissed its informal petition as untimely, because the error in the latitude of Station KNNF731 was a ministerial error that the Commission can correct more than thirty days after final action.¹⁶ We agree.¹⁷ Had Showboat or VSS brought the error to our attention in the three-and-a-half years before ReadyMix received its license for Station WPRI751, we almost certainly would have corrected the license for Station KNNF731. VSS did not seek relief, however, until after the license grant to ReadyMix became a final action. We believe that the administrative error doctrine should be invoked to bring about equitable solutions to conflicting claims.¹⁸ Therefore, we must examine the equities of the situation.

7. We find it significant that VSS is authorized to operate on two frequency pairs in addition to frequency pair 899/938.4125 MHz,¹⁹ while that is the only frequency pair assigned to ReadyMix's Station WPRI751. Therefore, removing the frequency from ReadyMix's license would eliminate its authorization altogether, while removing the frequency from VSS's license would only reduce its station's capacity. In addition, while we agree with VSS that the failure of Showboat and VSS to examine the license earlier should not of itself defeat its claim,²⁰ we note that VSS (and, previously, Showboat) had multiple opportunities to seek correction of its license, and could have filed a timely opposition to ReadyMix's application or petition for reconsideration of the grant of ReadyMix's license. In light of the totality of the circumstances, we conclude that it would not be appropriate or equitable to now correct VSS's coordinates for frequency pair 899/938.4125 MHz and rescind ReadyMix's authorization for that frequency pair, as requested by VSS.²¹ In addition, it appears that VSS declined to cooperate in testing aimed at reaching a compromise between the two authorized stations, and instead

¹⁴ Letter dated Feb. 13, 2003 from Ronald G. Franklin, Industrial Telecommunications Association, to Peter Waltonen, Public Safety and Private Wireless Division.

¹⁵ *Id.* at 2.

¹⁶ VSS Petition at 5 (citing, e.g., International Broadcasting Network, *Memorandum Opinion and Order*, 2 FCC Rcd 2544 (1987) (*IBN*)).

¹⁷ See generally County of San Mateo, California, *Memorandum Opinion and Order*, 16 FCC Rcd 16501, 16503 ¶ 8 (2001) (*San Mateo*).

¹⁸ See Charles W. Fortner, *Order*, 16 FCC Rcd 20359, 20361 ¶ 6 (CWD PRB 2001) (invoking doctrine because “[w]e find it inequitable to deny Fortner authority to operate on the subject three frequencies”); see also *IBN*, 2 FCC Rcd at 2546 ¶ 11 (“Such rectification is appropriate to assure due process and the basic fairness of our administrative procedures to all applicants.”) (emphasis added).

¹⁹ See *VSS-Sunset Order*, 18 FCC Rcd at 1917 ¶ 7.

²⁰ VSS Petition at 6 n.5.

²¹ In addition, it is not clear that the administrative error doctrine would properly apply to action with respect to ReadyMix's license, as opposed to VSS's license. The Commission has stated,

This authority to revisit final actions is limited. It extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision. The taking of an erroneous action, itself, is not generally a ministerial error that can be corrected after the 30-day period has elapsed under 47 C.F.R. § 1.113(a).

San Mateo, 16 FCC Rcd at 16504 ¶ 10 (footnotes omitted). The license grant to ReadyMix can easily be characterized as “[t]he taking of an erroneous action,” rather than a “clerical or administrative error[] that underlie[s] or occur[s] in the process of taking an action.”

commenced full-time full-power operations on the frequency pair. Based on the totality of the circumstances, we conclude that it would be inequitable to rescind the grant of ReadyMix's authorization. We therefore deny VSS's request.

8. Instead, on our own motion, we initiate a proceeding to remove frequency pair 899/938.4125 MHz from VSS's authorization. We believe that Section 316 of the Communications Act of 1934, as amended, provides the appropriate vehicle for resolving this matter.²² Section 316(a) permits the Commission to modify a station license if the action will promote the public interest, convenience, and necessity.²³ In this connection, we note that the proposed modification would serve the public interest by preserving the existing coverage areas of affected parties and preventing harmful interference, while not unduly disrupting VSS's operations, as VSS has two additional frequency pairs on which to continue operation. Moreover, we conclude that the Branch's January 22, 2002 action granting of VSS's application to modify its license to change the authorized location for pair 899/938.4125 MHz was improper because VSS's requested location is closer to ReadyMix's Station WPRI751 than our rules permit.²⁴

9. Thus, we believe that a modification of the VSS license for Station KNNF731 to delete 899/938.4125 MHz as an operating frequency is appropriate. In accordance with Section 1.87(a) of the Commission's Rules,²⁵ we will not issue a modification order until VSS has received notice of our proposed action and has had an opportunity to interpose a protest. To protest the modification, VSS must, within thirty days of the release of this *Memorandum Opinion and Order*, submit a written statement with sufficient evidence to show that the modification would not be in the public interest. The protest must be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W., Room TW-A325, Washington, D.C. 20554.²⁶ If no protest is filed, VSS will have waived its right to protest the modification and will be deemed to have consented to the modification.²⁷

10. 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 Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by VSS Enterprises, LLC, on June 8, 2001 IS DENIED IN PART with respect to frequency pair 899/938.4125 MHz.

11. IT IS PROPOSED, pursuant to Sections 4(i) and 316(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 316(a), and Section 1.87 of the Commission's Rules, 47 C.F.R. § 1.87, that the license for Private Land Mobile Radio Service Station KNNF371, Las Vegas, Nevada, held by VSS Enterprise, LLC, BE MODIFIED by deleting the frequency pair 899/938.4125 MHz.

12. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* shall be sent by certified

²² 47 U.S.C. § 316.

²³ 47 U.S.C. § 316(a). Section 316(a) requires that we notify the affected station(s) of the proposed modification(s) and the public interest reasons for the action, and afford at least thirty days to respond.

²⁴ See 47 C.F.R. § 90.187.

²⁵ 47 C.F.R. § 1.87(a).

²⁶ The address for FCC locations should be used only for documents filed by United States Postal Service first-class mail, Express Mail, and Priority Mail. Hand-delivered or messenger-delivered documents for the Commission's Secretary are accepted only at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. Other messenger-delivered documents, including documents sent by overnight mail (other than United States Postal Service Express Mail or Priority Mail) should be addressed for delivery to 9300 East Hampton Drive, Capitol Heights, MD 20743. See FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence, *Public Notice*, 16 FCC Rcd 22165 (2001).

²⁷ 47 C.F.R. § 1.87(g), (h).

mail, return receipt requested to James R. Vanwoerkom, VSS Enterprises, LLC, P.O. Box 98138, 2800 Fremont St., Las Vegas, NV 89193-8138.

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
Wireless Telecommunications Bureau