

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

In the Matter of
ELMONT TRANS MED CORPORATION
Licensee of Station WIL722
File No. EB-00-TS221

ORDER

Adopted: September 11, 2003

Released: September 16, 2003

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

I. INTRODUCTION

1. In this Order, we address the issue referred to the Wireless Telecommunications Bureau in the Enforcement Bureau's August 2, 2001 Memorandum Opinion and Order in the above-captioned matter. Specifically, we address the allegation by Atlantic Telecommunications (Atlantic) that the license of Elmont Trans Med Corp. (Elmont) for Station WIL722 automatically cancelled because the station was not operational for over one year. For the reasons that follow, we find that the license for Station WIL722 cancelled automatically. Accordingly, we will modify our licensing records to reflect such cancellation.

II. BACKGROUND

2. On March 7, 1994, Elmont was granted a license to operate Station WIL722. The license authorized Elmont to operate three fixed sites and thirty-five mobile units. One of the fixed sites, located in Glen Oaks, Queens County, New York, was authorized to operate on frequency 472.1625 MHz. The other fixed sites (Queens Village, Queens County, and Elmont, Nassau County) and the mobile units were authorized to operate on frequency 475.1625 MHz. Elmont's license was renewed on February 8, 1999.

3. In a complaint filed March 8, 2000, co-channel licensee Atlantic alleged that Elmont did not timely construct its station and was operating at an unauthorized site in violation of the Commission's rules. The complaint stated that New York Radio Services, Inc. (New York Radio), which does not appear to be affiliated with Atlantic, monitored frequency pair 472/475.1625 MHz on a continuous basis from January 13, 1996 to February 1, 1997, and recorded no activity from Elmont. Thereafter, New

1 Elmont Trans Medical Corporation, Memorandum Opinion and Order, 16 FCC Rcd 14868 (EB 2001) (MO&O).

2 Atlantic is the licensee of Station WPNS833, Brooklyn, New York, which is authorized to operate on frequency pair 472/475.1625 MHz.

3 Request for Issuance of Notice of Violation and Order to Discontinue Unauthorized Operation (filed Mar. 8, 2000) at 1-2 (Complaint).

4 See id. at 2; Declaration from John Mazza, Chief Engineer, New York Radio Services, Inc., at 1 (dated Feb. 16, 2000) (Mazza Declaration). The monitoring was accomplished using an Icom-R7100 scanner in conjunction with custom engineered, computer controlled software. Mazza Declaration at 1. The monitoring was performed from two separate locations (684 Flushing Avenue and 2225 East 74th Street in Brooklyn, NY) simultaneously. Id. The

(continued...)

York Radio reportedly monitored the frequency pair sporadically.⁵ In late December 1998, New York Radio recorded its first activity from Station WIL722.⁶ In September 1999, New York Radio determined, through direction finding techniques, that the Station WIL722 signal was being transmitted from a location in Glendale, Queens County, New York.⁷ Atlantic requested that the Commission commence enforcement proceedings against Elmont for this unauthorized operation.⁸

4. Shortly after Atlantic filed its complaint, Elmont contacted the Commission's New York Field Office.⁹ Elmont stated that it had inadvertently constructed the Glen Oaks location of Station WIL722 at the Glendale site, co-located with the Glendale site of Elmont's Station WIL708.¹⁰ Without inspecting the Glendale site, an agent in the New York Field Office instructed Elmont to move the transmitter to the Glen Oaks location in order to correct the problem.¹¹ On August 10, 2000, the agent verified that Elmont was now operating Station WIL722 at its authorized Glen Oaks location.¹²

5. By letter dated January 23, 2001, the Enforcement Bureau's formerly named Technical and Public Safety Division (TPSD) responded to Atlantic's complaint.¹³ TPSD concluded, based on the information set forth above, that no enforcement action was warranted.¹⁴

6. On February 22, 2001, Atlantic filed a petition for reconsideration of TPSD's decision.¹⁵ Atlantic argued that New York Radio's continuous monitoring during the period of January 13, 1996 to February 1, 1997 demonstrated that Station WIL722 was not operational.¹⁶ Citing Section 90.157 of the Commission's Rules,¹⁷ Atlantic argued that Station WIL722 had discontinued operations for a period of time exceeding one year, and thus, the license to operate Station WIL722 cancelled automatically.¹⁸

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Flushing Avenue monitoring location is approximately 12.57 miles from Station WIL722's authorized Glen Oaks location, 11.26 miles from the Queens Village location, and 13.75 miles from the Nassau County location; the 74th Street monitoring location is approximately 13.34 miles from Station WIL722's authorized Glen Oaks location, 11.09 miles from the Queens Village location, and 12.88 miles from the Nassau County location.

⁵ Complaint at 3; Mazza Declaration at 1-2.

⁶ Complaint at 3; Mazza Declaration at 2.

⁷ Complaint at 3-4; Mazza Declaration at 2

⁸ Complaint at 5.

⁹ *MO&O*, 16 FCC Rcd at 14868 ¶ 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Letter dated Jan. 23, 2001 from James Dailey, Deputy Chief, Technical and Public Safety Division, Enforcement Bureau to Marilyn S. Mense, Lukas, Nace, Gutierrez & Sachs. On July 16, 2003, the Technical and Public Safety Division was renamed the Spectrum Enforcement Division by the Enforcement Bureau.

¹⁴ *Id.* at 1.

¹⁵ Petition for Reconsideration (filed Feb. 22, 2001) (Petition). Atlantic filed a supplement to the Petition on August 22, 2003.

¹⁶ *Id.* at 3-4.

¹⁷ 47 C.F.R. § 90.157 states that a station license shall cancel automatically upon permanent discontinuance of operations, and that a station that has not operated for one year or more is considered to have been permanently discontinued.

¹⁸ Petition at 4.

Atlantic also argued that Elmont's unauthorized operation of Station WIL722 from the Glendale site merited enforcement action.¹⁹

7. On August 2, 2001, the Enforcement Bureau in its *MO&O* admonished Elmont for its operation of Station WIL722 from an unauthorized location in violation of Section 1.903(a)²⁰ of the Commission's Rules.²¹ It also determined that the question of whether Elmont's license cancelled automatically in 1996 or 1997 due to discontinuance of operation under Section 90.157 of the Rules should be referred to the Wireless Telecommunications Bureau because it was a separate licensing issue.²²

8. By letter dated August 16, 2002, the Wireless Telecommunications Bureau's Public Safety and Private Wireless Division (PSPWD), acting pursuant to Section 308(b) of the Communications Act of 1934, as amended,²³ requested that Elmont provide information regarding the construction and operational status of Station WIL722 from January 13, 1996 to February 1, 1997.²⁴ PSPWD asked Elmont to provide documentation that the station was constructed and operational during that period, and to identify any person(s) with first-hand knowledge that the station was operational during that period.²⁵ Such documentation would include, by way of example, invoices for radio equipment, invoices for service contracts for radio equipment, contracts or other agreements with persons receiving communications services from Station WIL722, and leases or other agreements for the site at which Station WIL722 equipment was installed.²⁶ In its October 31, 2002 response, Elmont stated that during this period, Station WIL722 was operating on frequency pair 472/475.1625 MHz from the Glendale site.²⁷ To substantiate this claim, Elmont included a 1994 invoice for installation of a transmitter and programming of thirty-five mobile units.²⁸ It also identified its dispatcher as a person with first-hand knowledge that the station was operational. Elmont stated that the station was in continuous operation since 1994, but did not provide any other documentation.²⁹

III. DISCUSSION

9. Section 90.157 of the Commission's Rules provides that a license for a private land mobile radio station cancels automatically upon discontinuance of operation for a period of one year or more.³⁰ In this case, we find that Atlantic has established a credible case that Elmont's Station WIL722 did not operate from January 13, 1996 to February 1, 1997. Atlantic submitted a detailed, sworn declaration from

¹⁹ *Id.* at 4-5.

²⁰ 47 C.F.R. § 1.903(a).

²¹ *MO&O*, 16 FCC Rcd at 14869 ¶ 4. The Enforcement Bureau noted that the statute of limitations precluded imposition of a forfeiture against Elmont. *Id.* at 14869 n.4 (citing 47 U.S.C. § 503(b)(6)(B)).

²² *Id.* at 14869 ¶ 5.

²³ 47 U.S.C. § 308(b).

²⁴ Letter dated Aug. 16, 2002 from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Elmont Trans Med Corporation.

²⁵ *Id.* at 1-2.

²⁶ *Id.*

²⁷ Letter dated Oct. 31, 2002 from Philip Fortuna, Elmont Trans Med Corporation to D'wana R. Terry and Michael J. Wilhelm, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at 1.

²⁸ *Id.* at 1, 4.

²⁹ *Id.* at 2.

³⁰ 47 C.F.R. § 90.157.

New York Radio's chief engineer describing the continuous monitoring of Station WIL722 during that period. In response to PSPWD's request for information regarding the station's operations, Elmont offers only an unsworn general statement that the station was in operation. Elmont has failed to provide any objective and documentary evidence that contradicts the evidence Atlantic has submitted.

10. In fact, the only document that Elmont included with its response was a construction invoice for one transmitter. Even assuming that the transmitter to which the invoice refers was part of Station WIL722 rather than Station WIL708, the invoice demonstrates nothing more than the *construction* of one of the authorized locations; it does not establish that the constructed facility was *operating* from January 13, 1996 to February 1, 1997. Elmont did not provide any evidence that Station WIL722 was operating during this period. Such evidence that PSPWD did not specifically request in its Section 308(b) letter, but would have proven useful, include system maintenance records, or sworn affidavits from its dispatcher and mobile unit operators that describe how often communication was transmitted on the licensed frequency pair, and for what purpose the system was used.³¹ Based on the information before us, we conclude that Station WIL722 permanently discontinued operations pursuant to Sections 1.955(a) and 90.157 of the Commission's Rules, and that the license automatically cancelled.³²

11. Thus, the station license cancelled automatically no later than 1997, *i.e.*, before Elmont renewed the license in 1999. We find that the grant of the renewal application was based solely upon the licensee's failure to inform the Commission of the permanent discontinuance of operation as required under Section 1.955 of the Commission's Rules.³³ Accordingly, such renewal is invalid *ab initio* as there was no license extant which could be renewed.³⁴ We will modify the Commission's licensing records accordingly.

12. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, that the Commission's licensing records SHALL BE MODIFIED to reflect the cancellation of the license for Station WIL722.

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

³¹ See National Science and Technology Network Inc., *Order*, 15 FCC Rcd 16491, 16492 ¶ 4 (PSPWD WTB 2000) (Southern California Alarm failed to provide any documentation, such as station-specific canceled checks, system maintenance records, equipment serial numbers, or sworn affidavits from employees who had used the system from May 16, 1994, to May 16, 1995, to demonstrate continuous operation of Station WIK720).

³² See West Coast Cab Company, *Memorandum Opinion and Order*, 15 FCC Rcd 5909, 5914 ¶ 12 (2000).

³³ 47 C.F.R. § 1.955(a)(3) ("A licensee who discontinues operations shall notify the Commission of the discontinuance of operations by submitting FCC Form 601 or 605 requesting license cancellation.").

³⁴ Mobile Relay Associates, *Order*, DA 03-2155, ¶ 10 (WTB PSPWD rel. July 8, 2003) (citing James A. Kay, Jr., *Memorandum Opinion and Order*, 17 FCC Rcd 5951, 5952 ¶ 6 (WTB PSPWD 2002)).