

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

In the Matter of Application of)	
)	
McDOWELL CONSTRUCTION)	FCC File No. 0000781024
)	
and Request for Waiver to Operate)	
Other Industrial/Land Transportation)	
Station KVA588, Fresno, California)	

ORDER ON RECONSIDERATION

Adopted: February 10, 2003

Released: February 11, 2003

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

1. *Introduction.* On October 18, 2002, McDowell Construction (McDowell) filed a petition for reconsideration¹ of a decision by the Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Division),² denying its waiver request and dismissing its late-filed renewal application. For the reasons set forth below, we deny McDowell's Petition.

2. *Background.* McDowell is a small construction business.³ On January 14, 1997, the FCC granted McDowell's renewal of license application for operation of Industrial/Land Transportation Station KVA588, Fresno, California. On October 22, 2001, the FCC sent a renewal reminder notice for Station KVA588 to the contact address listed on the license.⁴ On January 14, 2002, the authorization for Station KVA588 expired by its terms. On February 21, 2002, McDowell filed an application for renewal of its license for Station KVA588. In conjunction with its application, McDowell submitted a request for waiver of Section 1.949 of the Commission's Rules to allow submission and acceptance of its renewal application after the license expiration date. In the waiver request, McDowell stated that (a) McDowell was a partner in the Gentz Construction and when the company split up all FCC correspondence was sent to and handled by the old ownership; (b) the renewal information was never relayed to the new company location and therefore the license was not renewed in a timely fashion, and (c) currently, all of its vehicles operate on this frequency.⁵

¹ See Petition for Reconsideration filed by Benjamin J. Aron, Esq., Schwaninger and Associates, P.C., on behalf of Randy McDowell and Samuel McDowell on Oct. 18, 2002 (Petition).

² Letter dated Sept. 18, 2002 from Ramona E. Melson, Deputy Chief, Public Safety and Private Wireless Division, to Randy McDowell, McDowell Construction (Dismissal Letter).

³ Petition at 2.

⁴ See FCC Reference Number 1119976, Renewal Reminder Notice sent Oct. 22, 2001. The letter was addressed to Randy McDowell and Samuel McDowell, 2055 E. North Avenue, Fresno, CA 93725.

⁵ See Waiver Request at 1.

3. On September 18, 2002, the Division denied McDowell's waiver request, and dismissed the application. The Division concluded that McDowell's claim that it would have timely filed a renewal application, but for the mishandling of correspondence following the dissolution of the partnership, did not warrant grant of a waiver of the Commission's Rules.⁶ On October 18, 2002, McDowell filed the Petition seeking reconsideration of the Division's decision.

4. *Discussion.* In 1999, the Commission adopted a new policy regarding treatment of late-filed renewal applications in the Wireless Radio Services.⁷ Renewal applications that are filed up to thirty days after the expiration date of the license will be granted *nunc pro tunc* if the application is otherwise sufficient under our Rules, but the licensee may be subject to an enforcement action for untimely filing and unauthorized operation during the time between the expiration of the license and the untimely renewal filing.⁸ Applicants who file renewal applications more than thirty days after the license expiration date may also 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, including more significant fines or forfeitures.⁹ 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.¹⁰

5. In its Petition, McDowell reiterates that the reason for its failure to file a timely renewal application was that it did not receive a renewal reminder, which occurred because it failed to notify the FCC of its new mailing address after the new company was formed.¹¹ In addition, McDowell urges us to take into account the short length of the delay in filing a timely renewal.¹² McDowell also states that, because it has been unable to locate alternative spectrum in the 800 MHz band, it has been and will be forced it to spend substantially more to procure alternative communications service than it would spend to operate its own communications system.¹³ McDowell argues that it should be granted relief in order to effectuate the Commission's policies in favor of small businesses.¹⁴

⁶ Dismissal Letter at 2. In addition, the Division stated that the Commission previously held in a similar context that the inadvertent failure to renew a license in a timely manner in connection with a merger does not warrant a waiver. *Id.* (citing Enogex, Inc., *Order* 16 FCC Rcd 5397, 5401 ¶ 10 (WTB PSPWD 2001); Duke Power Co., *Order*, 14 FCC Rcd 19431, 19434 ¶ 8 (WTB PSPWD 1999)).

⁷ See Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, WT Docket No. 98-20, 14 FCC Rcd 11476 (1999).

⁸ *See id.* at 11485 ¶ 22.

⁹ *See id.* at 11486 ¶ 22.

¹⁰ *See id.* at 11485 ¶ 22.

¹¹ Petition at 2-3.

¹² *Id.* McDowell has incorrectly stated that its renewal application was filed thirty-four days after expiration, when in fact it was filed thirty-eight days after expiration.

¹³ *Id.* at 4.

¹⁴ *Id.* at 3-5.

6. First, we note that McDowell's argument that it did not timely renew its license because the FCC sent the renewal reminder to its former address provides no basis for the relief requested, because, as we correctly noted, a licensee's obligation to file a timely renewal is not dependent on the FCC sending a renewal notice.¹⁵ In addition, we note that McDowell has procured alternative communications service, and thus is not without alternatives.¹⁶ That this alternative could cause McDowell to incur additional costs is not, by itself, sufficient grounds for granting the relief requested.¹⁷ We also reject McDowell's assertion that a waiver is appropriate because it has an impeccable licensing record and has at all time operated in accordance with its authorization; and, if reinstated, McDowell assures us that its operation would continue to comply with the Commission's Rules. This general assurance of future compliance with the Commission's licensing rules is also insufficient to warrant grant of a waiver.¹⁸ Finally, we have previously determined that the fact that a licensee is a small business is not a sufficient basis for granting a waiver.¹⁹ Based on our review of the record in this proceeding, we conclude that McDowell has failed to demonstrate that grant of a waiver is warranted under the circumstances presented.

7. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the petition for reconsideration submitted by McDowell Construction Company on October 18, 2002, IS DENIED.

8. 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

¹⁵ See First National Bank of Berryville, *Order*, 15 FCC Rcd 19693, 19696 ¶ 8 (WTB PSPWD 2000) (holding that a "licensee's obligation to timely file a renewal application is not dependent upon the Commission sending a renewal notice to the licensee; rather it is the responsibility of each licensee to renew its application prior to the expiration date of the license") (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 Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21071 ¶ 96 (1998)).

¹⁶ Cf. R/M Management Co. Inc., *Memorandum Opinion and Order*, DA 02-3608, ¶ (WTB PSPWD rel. Dec. 31, 2002) (affirming denial of a request for special temporary authority from a licensee whose license expired, in part because the licensee had procured alternative service, so no emergency existed).

¹⁷ See Country Cousins, Inc., *Order*, 14 FCC Rcd 19351, 19352-53 ¶ 6 (WTB PSPWD 1999).

¹⁸ See Southwest Central Dispatch, *Order*, 16 FCC Rcd 19509, 19510-11 ¶¶ 4, 7 (WTB PSPWD 2001).

¹⁹ The Beeper People, Inc., *Order on Reconsideration*, 17 FCC Rcd 8590, 8594 ¶ 10 (WTB PSPWD 2002) (citing Cambridge Tel. Co., *Order*, 16 FCC Rcd 15409 (WTB PSPWD 2001)).