

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

In the Matter of)
AMERICAN MOBILE)
TELECOMMUNICATIONS ASSOCIATION)
INDUSTRIAL TELECOMMUNICATIONS)
ASSOCIATION)
Petitions for Amnesty Period for Part 90 Private)
Land Mobile Licensees to File Untimely)
Construction Notifications)

ORDER

Adopted: May 25, 2004

Released: May 28, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Chief, Broadband Division, and Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

1. Introduction. On May 5, 2003, the Industrial Telecommunications Association (ITA) and the law firm of Blooston, Mordkofsky, Duffy & Pendergast (Blooston) jointly filed a Petition for Rulemaking requesting that the Commission allow Part 90 private land mobile radio (PLMR) licensees that have constructed their licensed facilities as required, but failed to file timely construction notification (FCC Form 601, Schedule K), an amnesty period of 180 days during which to file their construction notifications without having to file for an extension of time or request for waiver of the Commission's rules.1 On May 25, 2003, the American Mobile Telecommunications Association (AMTA) filed a similar request for a three-month amnesty period for all Part 90 licensees to file late construction notifications without having to file for an extension of time or request for waiver of the Commission's rules.2 For the reasons stated below, we grant the requests in part and deny them in part. Specifically, we hereby grant a waiver of the Commission's Rules to permit the acceptance of all pending3 late-filed notifications of timely construction for Part 90 licenses in services (both PLMR4 and commercial5) that were not subject to a rule-based construction notification requirement prior to the implementation of the Universal

1 Petition for Rulemaking, dated May 5, 2003 (Petition).

2 Letter dated May 25, 2003 from Alan R. Shark, President & CEO, AMTA to John Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (AMTA Letter).

3 I.e., filed prior to the release date of this Order, and still pending. This waiver does not extend to late-filed construction notifications that were filed and dismissed prior to the release date of this Order for failure to request a waiver of the Commission's Rules.

4 Specifically, service codes GA, GB, GF, GI, GO, GP, GU, IG, PW, QM, RS, YA, YB, YF, YG, YI, YP, YU, and YW.

5 Specifically, service codes GS (the five shared channels), IK (below 470 MHz), LN, LW, and YK (below 470 MHz).

Licensing System (ULS).⁶ In addition, on our own motion, we afford the same relief to site-based Part 101 licensees.⁷

2. *Background.* In connection with the Commission's implementation of the ULS, all Wireless Radio Service licensees are required to certify compliance with applicable construction or coverage requirements relating to new applications, or modification applications that involve additional frequencies and/or locations.⁸ These notification requirements improve the accuracy and integrity of the ULS database, and thereby provide an affirmative means by which the Commission can monitor and ensure compliance with construction obligations and provide other entities access to unused spectrum. While many Wireless Radio Services have traditionally been subject to rule-based construction and coverage requirements, in some services the Commission in the past relied on licensees or potential applicants to notify the Commission when a station was not constructed or coverage requirements were not met.⁹ It was not until it adopted rules associated with the implementation of ULS that the Commission required all Wireless Radio Service licensees to file construction or coverage notifications.

3. The Wireless Telecommunications Bureau (Bureau) began using the ULS for all post-auction licensing for the Wireless Radio Services in December 1997, and began a phased transition of all licensing data from existing databases to ULS, beginning with common carrier paging, in June 1998.¹⁰ Currently, the ULS notifies wireless licensees by mail of impending construction deadlines at least ninety days prior to the relevant deadline. The Commission requires that each licensee file its construction notification no later than fifteen days after expiration of the applicable construction period.¹¹ In order to file a notification after the fifteen-day deadline, the licensee must file the late notification with a request for waiver of Section 1.946(d) of the Commission's Rules. If the Commission does not receive timely notice of construction from the licensee, the spectrum authorized by the license may then be made available for the Commission to reassign based on the rules governing the particular radio service.¹²

4. The requirement to file construction notifications took effect July 1, 1999, or six months after the commencement of application processing in the ULS for a particular service, whichever is later.¹³ For services in which construction deadlines were not assigned prior to implementation in ULS, the requirement to file notifications applies only to applications granted after the service was converted to the ULS.¹⁴ On March 7, 2003, the Bureau released a *Public Notice* clarifying the dates on which the construction notification requirement became effective for specific services.¹⁵

⁶ ULS is an interactive licensing system developed by the Bureau to consolidate and replace eleven existing databases previously used to process applications and grant licenses in the wireless services.

⁷ Specifically, service codes CE, CF, CT, MG, MW, PE, WA, WM, and WR.

⁸ See Biennial Regulatory 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, *Report and Order*, WT Docket No. 98-20, 13 FCC Rcd 21027, 21076-77 ¶¶ 106-08 (1998) (*ULS R&O*).

⁹ *Id.* at 21074 ¶ 102.

¹⁰ *Id.* at 21030 ¶ 3.

¹¹ See 47 C.F.R. § 1.946(d).

¹² *ULS R&O*, 13 FCC Rcd at 21077 ¶ 106.

¹³ *Id.* at 21077 ¶ 107.

¹⁴ See Wireless Telecommunications Bureau Clarifies Construction Requirements for the Private Radio Services, *Public Notice*, 18 FCC Rcd 3322, 3322 (2003) (*Public Notice*).

¹⁵ *Id.*

5. Petitioners note that, prior to the implementation of the ULS, PLMR licensees did not have to report their construction status on any routine basis.¹⁶ They contend that when the Commission initiated the notification requirement, it was new and unfamiliar, and there was confusion about the applicability of the construction notification rule. ITA and Blooston suggest a number of reasons why some licensees may not have filed a timely notification of construction during the conversion to ULS: for example, a licensee's failure to file a change of address could have caused the reminder letter to be sent to the wrong address; the licensee may have relied on an equipment sales representative who was not aware of the notification requirement; the licensee may be confused as to whether the requirement applies to licenses granted before the effective date of the construction notification requirement but with a construction or coverage deadline after the new rule became effective; or the licensee became aware of the requirement after the fifteen-day deadline and fears enforcement action if a late notification is filed.¹⁷ Other licensees may have submitted notifications that were not received on time due to mailing errors or delays in mail processing.¹⁸ ITA and Blooston believe that the confusion regarding construction notification is exacerbated because PLMR licensees' primary business focus is not wireless telecommunications, but rather daily business activities to which the use of radios is a supplement.¹⁹ AMTA states that a number of licensees did not know they were required to submit a notification within the construction period because their authorizations were issued after the implementation of ULS, but before the automatic notification process began.²⁰ It contends that now that ULS automatically notifies licensees of construction and coverage deadlines, the process will work efficiently and licensees will make timely notifications.²¹

6. Petitioners agree that the construction notification requirement improves the Commission's database accuracy and integrity, and they support the requirement as an efficient and effective mechanism for maintaining accurate licensing data and effective spectrum management.²² They state that licensees who failed to realize their regulatory responsibility may be reluctant to file late notifications because of a fear of the assessment of a fine or loss of license, or may be reluctant to bear the burden and cost to prepare (or have a third party prepare) the request for waiver of Section 1.946.²³ Petitioners believe that an amnesty period will make licensees more willing to file their late notifications, thereby allowing the Commission to obtain a more accurate database and promoting more efficient use of the spectrum.

7. *Discussion.* We believe that the instant petitions are best characterized as requests for a waiver of Section 1.946 of the Commission's Rules. Section 1.925 of the Commission's Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁴ We conclude that a waiver is warranted under the circumstances presented, but

¹⁶ *AMTA Letter* at 2; *Petition* at 4. Licensees in some, but not all, other Wireless Radio Services already were subject to a notification requirement. See *ULS R&O*, 13 FCC Rcd at 21074 ¶ 102.

¹⁷ *Petition* at 6.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 7.

²⁰ *AMTA Letter* at 2.

²¹ *Id.*

²² *AMTA Letter* at 1; *Petition* at 4.

²³ *AMTA Letter* at 2; *Petition* at 6.

²⁴ 47 C.F.R. § 1.925(b)(3). See also *WAIT Radio v FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969).

not to the extent requested by the Petitioners. Specifically, we conclude that the underlying purpose of the subject rules would not be served by strict application to the instant case, and grant of a waiver would be in the public interest.

8. We note, as an initial matter, that some confusion may have arisen from adoption of the ULS notification requirement for Wireless Radio Service licensees, many of whom were not previously required to notify the Commission of construction status on a routine basis, to now certify compliance with construction requirements. The Bureau recognized those conditions, and issued a *Public Notice* to clarify the construction requirements for the Private Radio Services.²⁵ We also reaffirm that the intention of the construction notification is to confirm that licensees have met their responsibility, not to cancel the licenses for legitimately operating facilities.²⁶ After considering the circumstances, we conclude that the best approach is to grant a waiver of Section 1.946(d) to allow acceptance of pending late-filed construction notifications. This will assist the Commission to achieve a more accurate licensing database and reduce the administrative burden of individually processing a significant number of waiver requests. We note that in the interest of maintaining the integrity and accuracy of the licensing database, we have in the past granted requests for waiver and accepted late-filed construction notifications if the licensee indicates that it met the construction deadline but requires a waiver of the rule governing timely filing of such notifications. We believe that the same factors that warranted grant of those waivers are present with respect to the instant petitions. Thus, we conclude that Petitioners have shown good cause for a waiver of Section 1.946(d) of the Commission's Rules to accept late-filed construction notifications for Part 90 licenses in services that were not subject to a rule-based construction notification requirement prior to the implementation of ULS.²⁷

9. Many of the same reasons that warrant a waiver for Part 90 services also apply equally to the Part 101 services. While site-based common carrier fixed microwave services were subject to a rule-based construction notification requirement up until August 1996,²⁸ the requirement was eliminated by the rulemaking proceeding that created Part 101.²⁹ Site-based private operational fixed microwave stations, like Part 90 stations, were not previously subject to a rule-based construction notification requirement. In light of these circumstances, we believe that many of the arguments presented by the Petitioners are also relevant to site-based Part 101 licenses. Therefore, we conclude that it is reasonable to afford the same relief that we adopt herein for Part 90 licenses to site-based Part 101 licenses as well.

10. The relief that we grant herein applies only to those pending late-filed construction notifications filed prior to the release date of this *Order*. While we agree that limited relief is warranted, we emphasize that licensees are expected to be aware of, and fulfill, their regulatory obligations. We underscore that the ULS-generated notification reminder letters are an aid provided by the Commission,

²⁵ *Public Notice*, *supra* note 14.

²⁶ *ULS R&O*, 13 FCC Rcd at 21076 ¶ 106.

²⁷ We grant relief herein only with respect to late-filed notifications of timely construction. As a result, the granted relief does not extend to notifications for construction that was not completed by the applicable deadline. Under the Commission's Rules, failure to construct by the applicable deadline, absent an extension of time to construct, results in automatic termination of the license. See 47 C.F.R. § 1.946(c). We remind licensees that Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17, requires truthful statements in all filings with the Commission, and that there are severe penalties for filing false notifications. See, e.g., *MobileMedia Corporation, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture*, 12 FCC Rcd 14896, 14899-14900 ¶¶ 7-9 (1997).

²⁸ See 47 C.F.R. § 21.43 (1995).

²⁹ Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, *Report and Order*, WT Docket No. 94-148, 11 FCC Rcd 13449 (1996).

and that not receiving a reminder letter is not a sufficient reason to not file the notification.³⁰ Consequently, we conclude that a prospective amnesty period to permit the filing of late construction notifications would not be appropriate at this time.³¹ Instead, late-filed construction notifications filed on or after the release date of this *Order* must be filed with a request for waiver of Section 1.946(d), or the spectrum authorized by the license may then be made available for the Commission to reassign based on the rules governing the particular radio service.

11. Finally, ITA and Blooston believe that licensees need to be educated about the construction notification requirement.³² They suggest a number of actions to educate licensees, such as posting an alert on our website; including a letter explaining the construction notification with each wireless license we issue; encouraging Frequency Advisory Committees (FAC), law firms and trade associations to send similar form letters and display information on websites; requesting equipment manufacturers and vendors to include information in their packaging; and prevailing on trade publications to highlight the requirement.³³ We agree that trade associations, the communications bar, FACs, and equipment manufacturers and vendors are valuable resources that can be utilized to augment and complement our outreach efforts. In this connection, we encourage them to assist us in our efforts to ensure that the subject of this *Order* as well as other applicable information is disseminated effectively to licensees.³⁴

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 303(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(i), and Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the Petition for Rule Making filed by Industrial Telecommunications Association and Blooston, Mordkofsky, Duffy, & Pendergast, on May 5, 2003, and the request filed by the American Mobile Telecommunications Association on May 25, 2001, ARE GRANTED IN PART AND DENIED IN PART to the extent set forth herein.

13. IT IS FURTHER ORDERED that Section 1.946(d) of the Rules, 47 C.F.R. § 1.946(d), IS WAIVED with respect to those pending (*i.e.*, filed before the date of the release of this *Order*) late-filed construction notifications for Part 90 licenses in services (both PLMR³⁵ and commercial³⁶) that were not subject to a rule-based construction notification requirement prior to the implementation of the Universal Licensing System and for site-based Part 101³⁷ licenses, and that those construction notifications SHALL BE PROCESSED consistent with this *Order*.

³⁰ *ULS R&O*, 13 FCC Red at 21075 ¶ 104.

³¹ Our decision, based on the current record, not to open a prospective amnesty period at this time does not foreclose the Bureau or any Division thereof from subsequently granting such relief with respect to any or all of the radio services within the scope of this *Order*.

³² *Petition* at 8.

³³ *Id.* at 9.

³⁴ Along these lines, in addition to posting this *Order* on our website, we will consider what other actions we can take to alert licensees of the notification requirements.

³⁵ Specifically, service codes GA, GB, GF, GI, GO, GP, GU, IG, PW, QM, RS, YA, YB, YF, YG, YI, YP, YU, and YW.

³⁶ Specifically, service codes GS (the five shared channels), IK (below 470 MHz), LN, LW, and YK (below 470 MHz).

³⁷ Specifically, service codes CE, CF, CT, MG, MW, PE, WA, WM, and WR.

14. 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 COMMUNICATION

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