



Federal Communications Commission  
Washington, D.C. 20554

June 12, 2006

DA 06-1261

Brigitte L. Adams, Esq.  
2800 Wisconsin Ave., N.W. #208  
Washington, D.C. 20007

Re: 800 MHz SMR Station WPLM218

Dear Ms. Adams:

Before us is a Petition for Reconsideration (Petition) filed by Cellutech on October 28, 2005.<sup>1</sup> The Petition seeks reconsideration of a decision by the Wireless Telecommunications Bureau's Mobility Division (Division) to deny Cellutech's request for a waiver of the construction requirements for its former 800 MHz Specialized Mobile Radio (SMR) license WPLM218, the A block 800 MHz SMR license in the American Samoa Economic Area (EA).<sup>2</sup> For the reasons stated below, the Petition is denied.

Under Sections 90.685(b) and 90.685(c) of the Commission's rules then in effect during the period of time Cellutech held the subject license, Cellutech was required to (1) operate facilities to cover one-third of the EA's population and (2) construct at least fifty percent of the total channels in at least one location of the EA within three years of initial license grant.<sup>3</sup> Further, under Section 90.685(b) of the Commission's rules, Cellutech was required to operate facilities to cover two-thirds of the EA's population within five years of initial license grant.<sup>4</sup> Cellutech's license was granted March 10, 1998, thus its three and five-year construction deadlines were March 10, 2001, and March 10, 2003, respectively.

On March 17, 2005—over four years after its three-year construction deadline and two years after its five-year construction deadline—Cellutech filed a request for waiver of the five-year construction deadline.<sup>5</sup> In its Waiver Request, Cellutech did not address its failure to meet the three-year construction deadline. Instead, Cellutech argued that its five-year construction requirement should be waived because American Samoa is geographically remote and communications between Cellutech's Washington, D.C. office and

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<sup>1</sup> Petition for Reconsideration filed by Cellutech on October 28, 2005 (Petition).

<sup>2</sup> See Letter dated September 30, 2005, from Thomas Derenge, Deputy Chief, Mobility Division, to Mia Lovink, Cellutech, Call Sign WPLM218 (*Waiver Denial Letter*).

<sup>3</sup> 47 C.F.R. § 90.685(b) and (c).

<sup>4</sup> 47 C.F.R. § 90.685(b). Effective February 14, 2005 (nearly two years after Cellutech's five-year deadline), A–C block SMR licensees were provided the option of providing “substantial service” within five years of initial license grant. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, WT Docket No. 02-381, 2000 Biennial Regulatory Review *Spectrum Aggregation Limits for Commercial Mobile Radio Services*, WT Docket No. 01-14, *Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services*, and to *Facilitate Capital Formation*, WT Docket No. 03-202, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004).

<sup>5</sup> See File No. 0002090258 (Waiver Request).

American Samoa had been “difficult.”<sup>6</sup> Cellutech also claimed that its failure to construct should be excused because it faced weather and technical difficulties. In addition, Cellutech argued that its five-year construction requirement should be waived because its business plan was “affected” and because it had delays in funding.<sup>7</sup> In the *Waiver Denial Letter*, the Division found that Cellutech’s license terminated automatically on March 10, 2001, because Cellutech failed to satisfy its construction requirements and did not timely file a request for an extension of time to meet those requirements.<sup>8</sup> The Division also found that even if Cellutech had timely sought an extension of time to meet its construction requirements, Cellutech failed to demonstrate how the company met the waiver standard set forth in Section 1.925 of the Commission’s rules.<sup>9</sup>

Under Sections 1.946(c) and 1.955(a)(2) of the Commission’s rules, an 800 MHz SMR license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of Section 90.685, unless the Commission grants it an extension of time to construct or waives the construction requirements.<sup>10</sup> An extension of time to complete construction may be granted, pursuant to Section 1.946(e) of the Commission’s rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>11</sup> Waiver may be granted, pursuant to Section 1.925 of the Commission’s rules, if the licensee establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>12</sup>

In its Petition, Cellutech argues that the Division should reconsider its denial of Cellutech’s Waiver Request, citing the unique challenges of American Samoa and asserting that the area requires the “development of unique technology for a viable SMR system.”<sup>13</sup> Cellutech claims that “[o]nce the technology is perfected to overcome the topographical, environmental and population challenges, construction and implementation of the entire system will rapidly follow.”<sup>14</sup> Cellutech urges the Division to find that its efforts to deploy a system in American Samoa constitute “an adequate level of construction to permit the license to remain viable.”<sup>15</sup> We disagree.

The purpose of the Commission’s construction requirements is to ensure efficient spectrum utilization and rapid service to the public.<sup>16</sup> Cellutech’s inordinate delay and unspecified construction plans are not consistent with this policy. Furthermore, Cellutech has not shown that, in light of unique or unusual

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See *Waiver Denial Letter* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 90.685.

<sup>11</sup> 47 C.F.R. § 1.946(e).

<sup>12</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission may waive its rules if there is “good cause” to do so. 47 C.F.R. § 1.3.

<sup>13</sup> *Petition* at 4.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> 47 U.S.C. § 309(j).

circumstances, the construction requirements were inequitable, unduly burdensome, or contrary to the public interest, or that Cellutech had no reasonable alternative.

Cellutech concedes that it failed to meet its three-year construction deadline because it decided that an “incremental build-out plan” was impractical.<sup>17</sup> Cellutech states that because of its “inattention and lack of knowledge,” it did not file a timely request for an extension of time to construct for either its three or five-year construction deadlines, having “inadvertently overlooked its regulatory obligations.”<sup>18</sup> It is well established that licensees are required to be familiar with the Commission’s rules,<sup>19</sup> and that they are responsible for compliance with those rules.<sup>20</sup> In this regard, the Commission’s rules specify the construction requirements for 800 MHz SMR licensees, such as Cellutech.<sup>21</sup> The Commission’s rules also specify the requirements for requesting an extension of time to construct,<sup>22</sup> and the consequences for failure of a licensee to meet its construction obligations.<sup>23</sup>

In view of the foregoing, we find no basis to disturb the Division’s determination that Cellutech failed to satisfy its three and five-year construction requirements and that it failed to justify a waiver of the deadlines for filing a request for extension of time to meet its construction obligations. Accordingly, we affirm our determination that Cellutech’s license terminated automatically on March 10, 2001, and accordingly deny its Petition for Reconsideration. This action is taken pursuant to delegated authority by Section 4(i) of the Communications Act, as amended, 47 C.F.R. § 154(i), and by Sections 0.131, 0.331 of the Commission rules, 47 C.F.R. §§ 0.131, 0.331.

Sincerely,

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 2 and 5.

<sup>19</sup> See *Instapage Network, Ltd., Notification of Construction and Request for Waiver of Narrowband PCS Station KNKV222, Order on Reconsideration*, 17 FCC Rcd 19083, 19091 (WTB 2002) (licensees “have an obligation to be aware of the Commission’s rules”) (*Instapage*); North Eastern Massachusetts Law Enforcement Council, *Order*, 16 FCC Rcd 12,474, 12,476 (WTB, PSPWD 2001) (applicants must stay apprised of the FCC’s filing requirements and other rules). See also 47 C.F.R. § 0.406 (“Persons having business with the Commission should familiarize themselves with those portions of its rules and regulations pertinent to such business.”)

<sup>20</sup> See *Instapage*, 17 FCC Rcd at 19091 (licensees are responsible for their compliance with the Commission’s rules); C&W Systems, LTD., *Order*, 16 FCC Rcd 2913, 2916 (WTB, PSPWD 2001) (ignorance of the Commission’s Rules does not excuse noncompliance); Supercom, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4604, 4607 (WTB, CWD 2000) (same).

<sup>21</sup> 47 C.F.R. § 90.685 (construction requirements for 800 MHz SMR licensees).

<sup>22</sup> 47 C.F.R. § 1.946(e).

<sup>23</sup> Section 1.946(c) states that “[i]f a licensee fails . . . to meet its coverage . . . obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.” 47 C.F.R. § 1.946(c).