

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

In the Matter of)
SAMUEL MOSES)
Licensee of 900 MHz Private Land Mobile Radio)
Station WPTG843)
Petition to Deny or Informal Objection, Petition)
for Reconsideration, Motion for Set Aside and)
Motion for Stay; and)
DALLAS AREA RAPID TRANSIT)
AUTHORITY)
Licensee of 900 MHz Private Land Mobile Radio)
Station WNJU479)
Request for Reinstatement of Licensed Frequency)
and for Cancellation or Revocation of License)

File No. 0001077180

ORDER

Adopted: July 5, 2006

Released: July 7, 2006

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

I. INTRODUCTION

1. In this Order, we address several pleadings filed by Samuel Moses (Moses) in connection with the grant of Special Temporary Authorization (STA) to the Dallas Area Rapid Transit Authority (DART) to operate Station WPWF999 on frequency 936.9000 MHz at Dallas, Texas: the Petition to Deny, which requests the dismissal or denial of the request for STA; the Petition for Reconsideration, which requests reconsideration of the grant of STA; the Motion for Set Aside, which requests that the grant to DART be set aside; and the Motion for Stay, which requests a stay of the STA grant pending resolution of his other petitions. We also address a Request for Reinstatement and Cancellation filed by DART, which requests correction of an alleged licensing error on DART's authorization to operate Station WNJU479. Specifically, DART requests that the Commission reinstate DART's permanent

1 FCC File No. 0001077180, Petition to Deny or Informal Objection, filed on Nov. 6, 2002.

2 FCC File No. 0001077180, Petition for Reconsideration, filed on Nov. 27, 2002.

3 FCC File No. 0001077180, Motion for Set Aside, filed on Nov. 27, 2002.

4 FCC File No. 0001077180, Motion for Stay, filed on Nov. 27, 2002.

5 FCC File No. 0001077180, Opposition to Petition to Deny or Informal Objection and Request for Reinstatement of Licensed Frequency and for Cancellation or Revocation of License, filed on Nov. 18, 2002 (Request for Reinstatement and Cancellation). Moses filed a Reply to Opposition to Petition to Deny or Informal Objection (FCC File No. 0001077180, filed on Nov. 27, 2002), and Moses filed an opposition in response to DART's Request for Reinstatement and Cancellation (FCC File No. 0001077180, Opposition to Request for Reinstatement of Licensed Frequency and for Cancellation or Revocation of License, filed on Nov. 27, 2002). In turn, DART filed a reply (FCC

(continued...)

authorization for frequency 936.9000 MHz, and revoke the co-channel license issued to Moses for Station WPTG843, Dallas, Texas.⁷

2. For the reasons discussed herein, we conclude that frequency 936.9000 MHz was properly assigned to Moses under Call Sign WPTG843. There are irrelevancies and procedural deficiencies in the pleadings of both parties. However, all pleadings are directed to the same issue and we treat them collectively and for convenience as informal requests for Commission action pursuant to Section 1.41 of the Commission's Rules.⁸ The single issue presented is which party should have the right to use frequency 936.9000 MHz in the Dallas area: (1) DART, which was previously licensed for the frequency but neglected to list it on applications for renewal of the license for Station WNJU479; or (2) Moses, who subsequently filed for and received a license for the frequency under Call Sign WTPG843. We resolve the issue in Moses's favor but allow DART to continue operating on the frequency until the end of the term of the STA under which it now operates. Accordingly, we deny DART's Request for Reinstatement and Cancellation, and grant Moses's Petition to Deny, Petition for Reconsideration, and Motion to Set Aside, to the extent that we will not permit DART to use frequency 936.9000 MHz beyond the term of its current STA grant. We also dismiss Moses's Motion to Stay as moot.

II. BACKGROUND

3. DART's original license for Station WNJU479 was issued in 1987.⁹ DART has operated on twelve paired 900 MHz channels in the Dallas area as part of its multi-channel trunked system. Channels in the system have been licensed for base transmitter operation on the "high side" of the frequency pair, with corresponding mobile frequencies.¹⁰ DART's system coordinates the activities of 1500 public transit vehicles used to transport passengers.¹¹

4. On July 18, 1997, DART filed an application for renewal of the license of Station WNJU479 on FCC Form 600, which required a listing of each of the frequencies that DART sought to renew on an attached Schedule G, Technical Data form.¹² Because DART was licensed for twelve

(...continued from previous page)

File No. 0001077180, Reply to Opposition to Request for Reinstatement of Licensed Frequency and for Cancellation or Revocation of License, filed on Dec. 10, 2002). On December 10, 2002, DART filed an opposition to the Petition for Reconsideration, Motion for Set Aside, and Motion for Stay. FCC File No. 0001077180, Opposition to Petition for Reconsideration, Motion for Set Aside and Motion for Stay, filed on Dec. 10, 2002.

⁶ Request for Reinstatement and Cancellation at 1.

⁷ After the pleadings were filed, Moses assigned the license for Station WPTG843 to S M Leasing and Rental Ltd. See FCC File No. 0002175028. We believe that the matter is not moot, however, because DART seeks to be licensed on frequency 936.9000 MHz on an exclusive basis. Thus, this matter affects the present license.

⁸ 47 C.F.R. § 1.41.

⁹ FCC File No. 8707578885, FCC Form 574-L.

¹⁰ See 47 C.F.R. §§ 90.20, 90.35, 90.173(i). Frequencies in the 900 MHz band are assigned in pairs with mobile and control stations frequencies taken from the 896-901 MHz band segment and corresponding base station frequencies taken from frequencies 39 MHz higher and taken from the 935-940 MHz band segment. See 47 C.F.R. § 90.613.

¹¹ See FCC File No. 0000960501. DART is a regional transportation authority for the greater Dallas area. DART's responsibilities include managing a number of different transit systems in various cities in the Dallas, Texas area.

¹² FCC Form 600, filed July 1997.

frequency pairs and mobile talk around,¹³ the renewal application required thirty-six individual frequency entries. DART's renewal application, however, contained what DART describes as a typographical error.¹⁴ Rather than requesting base station authority for both 936.0000 MHz and 936.9000 MHz, DART twice listed the base frequency 936.0000 MHz (omitting the base station frequency 936.9000 MHz).¹⁵ The application was granted on October 6, 1997, but because the base frequency 936.9000 MHz was not listed on DART's renewal application, DART's authorization was not renewed for base station frequency 936.9000 MHz. On July 12, 2002, DART filed another renewal application, which also did not list base station frequency 936.9000 MHz.¹⁶ The application was granted on July 13, 2002.

5. Because frequency 936.9000 MHz became available for licensing after DART's renewal of the license for Station WNJU479, Moses was granted authority to operate Station WPTG843 on base station frequency 936.9000 MHz on October 1, 2001.¹⁷ In response to a complaint filed by Moses that DART was using frequency 936.9000 MHz without Commission authorization, the Commission's Enforcement Bureau issued DART a Notice of Violation (NOV) on October 18, 2002.¹⁸ On November 1, 2002, DART filed an application for STA to use frequency 936.9000 MHz, explaining that its failure to list frequency 936.9000 MHz on its 1997 application for renewal of its license was an inadvertent typographical error.¹⁹ It also set forth the nature of its operations and asserted that there would be public safety implications if DART were not able to maintain communication with the fleet of public transit vehicles. That STA application was granted on November 7, 2002, under the Call Sign WPWF999.²⁰

¹³ See 47 C. F. R. §§ 90.155(c), 90.631(f), 90.633(d). The Commission's Rules require transmission and reception of radio signals between a base station and a mobile station for a system to be "placed in operation." "Mobile talk around" refers to communications directly between one vehicle and another vehicle, or mobile without the use of a repeater.

¹⁴ Request for Reinstatement and Cancellation at 4.

¹⁵ FCC Form 600-Schedule G, July 1997.

¹⁶ See FCC File No. 0000960501; see also Request for Reinstatement and Cancellation at 5; Petition for Reconsideration at 2.

¹⁷ See File No. 0000549249, granted Oct. 1, 2001. On October 3, 2002, Moses filed the required construction notification with the Commission. See FCC File No. 0001047976. It is not clear from the notification whether Moses constructed his base station, or only activated the associated mobile units. We note the arguments presented by DART that Moses certified that he constructed when he in fact had not. See Request for Reinstatement and Cancellation at 15-17. We further note Moses's representations to the Commission that he has been unable to obtain a lease or to construct a base station either because DART was already operating on the frequency or due to DART's harmful interference. See, e.g., Letter from Dennis C. Brown, counsel for Samuel Moses, to David Solomon, Chief, Enforcement Bureau, Federal Communications Commission, dated April 3, 2002; see also Petition to Deny or Informal Objection at 4. We conclude, under the circumstances presented, that we need not resolve the disputed issue of whether Moses ever constructed a base station, given the undisputed evidence that the operation of DART's base station currently renders the frequency unusable by Moses. Moreover, the present matter is limited to the issue of which of these two parties is duly licensed to use frequency 936.9000 MHz in the Dallas area; to the extent that DART wishes to pursue collateral issues relating to Moses's alleged misstatements, his qualifications as a licensee, and his eligibility to use the frequency, this is not the appropriate proceeding. See Request for Reinstatement and Cancellation at 17-20.

¹⁸ See File No. EB-020DL-307. DART responded to the NOV on November 5, 2002. See also Opposition to Petition for Reconsideration, Motion for Set Aside and Motion for Stay at 3 n.2.

¹⁹ See FCC File No. 0001077180.

²⁰ *Id.*

That STA has been renewed several times, most recently on June 12, 2006.²¹

6. On November 6, 2002, Moses filed a Petition to Deny or Informal Objection to DART's November 1, 2002 request for STA.²² Moses, citing Section 405(a) of the Communications Act of 1934, as amended, argued in essence that DART should have rectified its error by filing a timely petition for reconsideration within thirty days of the grant of the 1997 renewal application.²³ Moreover, Moses contended that DART ratified the deletion of frequency 936.9000 MHz from its license when DART filed a subsequent application for renewal of the license for Station WNJU479 in 2002.²⁴ Moses further argued that the Commission should dismiss or deny DART's November 1, 2002 STA request, and order DART to cease and desist use of frequency 936.9000 MHz.²⁵ Moses contended that because the Commission cannot lawfully grant "regular" authority to DART for frequency 936.9000 MHz,²⁶ there is no basis for allowing DART to continue to operate on that frequency under STA.²⁷ Moses also claimed that because DART failed to timely protest Moses's application for frequency 936.9000 MHz, Moses is entitled to exclusive use of that frequency,²⁸ and the Commission should not allow DART to continue operating on the frequency because DART's operations are causing interference to Moses's system.²⁹

III. DISCUSSION

7. We agree with DART that, pursuant to Section 316 of the Communications Act of 1934, as amended, the Commission is authorized to exercise its discretion to modify a license "if in the judgment of the Commission, such action will promote the public interest, convenience, and necessity, or the provisions of this Act . . . will be more fully complied with."³⁰ We also agree with DART that although Section 405 of the Act, as amended, requires that petitions for reconsideration be filed within thirty days after public notice of the action is given,³¹ Commission action under Section 316 is not subject to the limitations on revocation, modification or reconsideration imposed by Section 405 and implemented by Sections 1.106³² and 1.113³³ of the Commission's Rules.³⁴ Therefore, DART is not precluded from seeking relief pursuant to Section 316.

²¹ See FCC File No. 0002644336.

²² See Petition to Deny.

²³ 47 U.S.C. § 405(a).

²⁴ Petition to Deny at 1-2.

²⁵ *Id.* at 4.

²⁶ Frequencies in the 900 MHz bands are assigned on an exclusive basis. See 47 C.F.R. § 90.631.

²⁷ Petition to Deny at 3.

²⁸ *Id.*

²⁹ *Id.* at 1, 3-4. Moses indicates that he constructed the facilities of Station WPTG843 and commenced operation, but has been unable to make effective use of the station because of ongoing, unauthorized interference by DART. See n.17, *supra*.

³⁰ 47 U.S.C § 316(a)(1); see also Request for Reinstatement and Cancellation at 11-12.

³¹ 47 U.S.C § 405.

³² 47 C.F.R. § 1.106.

³³ 47 C.F.R. § 1.113.

³⁴ See California Metro Mobile Communication, Inc., *Memorandum Opinion and Order*, 17 FCC Rcd 22974, 22975 ¶ 6 (2002) (California Metro Mobile), *aff'd*, 365 F.3d 38 (D.C. Cir. 2004).

8. In our consideration of Section 316 relief, we note that the charge first given to the Commission by Congress was to promote “the safety of life and property through the use of . . . radio communication.”³⁵ Consistent with this charge, Commission policy regarding the reinstatement of authorizations generally involves an analysis of public interest considerations.³⁶ For the reasons stated below, we find that DART has not advanced public interest considerations that justify reinstatement of its authority to operate on frequency 936.9000 MHz.

9. In its Request for Reinstatement and Cancellation, DART generally describes its responsibilities of managing a transit system, which includes the public bus, electric light rail, and commuter rail systems, and the monitoring of high occupancy vehicle lanes.³⁷ It describes its operating area as more than 750 square miles, covering a population of almost two million residents.³⁸ DART further explains that local officials may rely on DART and its communications system to implement effective evacuation of the area’s buildings, nursing homes and other establishments in the event of an emergency such as a terrorist attack.³⁹

10. We understand that if DART is required to relinquish use of frequency 936.9000 MHz, its system’s capacity will be somewhat reduced, and 1500 transit vehicle radios may have to be reprogrammed and software changes made.⁴⁰ However, we are not convinced based on the evidence presented that DART’s loss of frequency 936.9000 MHz or its inability to locate replacement 900 MHz spectrum⁴¹ would leave DART with a system incapable of meeting its communications requirements in the Dallas region. While DART has described a situation in which its system might possibly suffer some temporary disruption if the 936.9000 MHz frequency is not available to it, the description falls short of a showing that DART requires the frequency to promote the public interest, convenience, and necessity.⁴²

³⁵ 47 U.S.C § 151 (1934).

³⁶ See, e.g., ADF Communications, Inc., Application for a New 470 MHz Radio Station in Boston, Massachusetts, *Memorandum Opinion and Order*, 14 FCC Rcd 17037 (WTB 1999). In that case, the Wireless Telecommunications Bureau (Bureau) determined that the reinstatement of the Revere Police Department’s authorization of frequency operations was in the public interest. This determination took into account the Revere Police Department’s critical need for the frequencies. Specifically, the Bureau determined that a denial of the requested relief would create an emergency situation in which police, fire and medical units would lose communications service vital to the health and safety of an entire populous community.

³⁷ Request for Reinstatement and Cancellation at 2.

³⁸ *Id.* at 1-2.

³⁹ *Id.*

⁴⁰ See Reinstatement and Cancellation at 13-14.

⁴¹ *Id.* DART explains that it has confirmed with a certified frequency coordinator that there are no 900 MHz channels available for assignment at DART’s Dallas, Texas site, and that such spectrum has been fully licensed for a number of years.

⁴² See New York City Transit Authority, *Petition for Reconsideration and Reinstatement, Order Proposing Modification and Order to Show Cause*, 3 FCC Rcd 5621 (PRB 1988). In granting reinstatement of the New York City Transit Authority’s license, the Private Radio Bureau found that the proposed system was unique, involving the safety of millions of passengers on thousands of buses, and that it was totally dependent upon retention of the twenty channels at issue. The channels involved were licensed for use in a city-wide bus radio system that would provide operational and emergency communications. The Private Radio Bureau concluded that the safe and efficient operation of the urban mass transportation system for the largest city in the United States would be seriously harmed by cancellation of the licenses.

DART has additional frequencies on this system,⁴³ and has not explained how a failure to reinstate authority for its operations on the 936.9000 MHz frequency would actually hinder its overall operations. DART merely asserts in its Request for Reinstatement and Cancellation that such failure to reinstate would not be in the public interest of its clients.⁴⁴ In contrast, the relief requested by DART would in effect require the revocation of Moses's license for Station WPTG843, which does not authorize operation on any other channels.⁴⁵ Accordingly, we find an insufficient basis to conclude that under the circumstances, the public interest, convenience, and necessity require the reinstatement of DART's authorization.⁴⁶

11. Although DART acknowledges responsibility for listing frequency 936.0000 MHz twice in its renewal application, it asserts in essence that the Commission compounded the error by not recognizing DART's error and returning the application for clarification.⁴⁷ We conclude that the error made by DART is not one that would have been readily apparent to the Commission in the routine processing of DART's application. The Commission staff relied on specific information in the renewal application in taking its action to not renew DART's authorization for frequency 936.9000 MHz.⁴⁸ We agree with Moses's assertion that the Commission granted DART renewal of the license for Station WNJU479 in the manner requested by DART's manually executed application.⁴⁹ While in hindsight it may have been preferable to have sought clarification from DART, we find that the Commission's actions here were not an inadvertent, unintentional, or ministerial error.

12. DART not only had a duty to submit accurate information and to know the state of its license, but also had a responsibility to confirm that its operations were authorized, which it failed to do.⁵⁰

⁴³ DART also is authorized to use frequencies under other call signs. See licenses for Stations KNGK465 (five 800 MHz channel pairs authorized at the same location as Stations WNJU479 and WPWF999) and WQAV359 (two VHF channels at various locations, granted in 2004).

⁴⁴ See Request for Reinstatement and Cancellation at 13-14.

⁴⁵ See VSS Enterps., LLC, *Memorandum Opinion and Order*, 15 FCC Rcd 6225, 6227 ¶ 7 (WTB PSPWD 2003) (*VSS*) (where frequency was erroneously licensed to two parties in the same vicinity due to a typographical error in the coordinates on one license, equitable considerations favor deleting the frequency from the license that has other frequencies rather than revoking the license that authorizes only that frequency); *cf.*, e.g., California Metro Mobile, 17 FCC Rcd at 22977 ¶ 12 ("CMMC has additional frequencies and has made no showing that [loss of the frequencies at issue] would actually hinder its service.").

⁴⁶ See Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 13 FCC Rcd 22761, 22768 ¶ 16 (2003) ("Section 316 modification should be undertaken only under . . . limited and unusual cases").

⁴⁷ See Request for Reinstatement and Cancellation at 7-11. DART believes that the Commission processor should not have deleted the frequency from the authorization without the requisite prior frequency coordination, because Section 90.135 of the Commission's Rules required licensees to submit to the applicable frequency coordinator any application for modification for any change listed in 47 C.F.R. §§ 1.929(c)(4) and 90.621(a)(1)(ii). See 47 C.F.R. § 90.135. DART also argues that it should have been clear that it did not intend to delete the frequency because the deletion resulted in an authorization for mobile operation on a frequency for which the licensee no longer had base station authority, contrary to the frequency pairing in Part 90.

⁴⁸ See Request for Reinstatement and Cancellation at 7-9.

⁴⁹ We note that the Universal Licensing System has subsequently been designed to avoid similar problems by eliminating the need to list specific frequencies in renewal applications.

⁵⁰ See Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000); see also 47 C.F.R. § 1.903(a) (stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service).

DART acknowledges that even after review of its renewal application, it failed to notice the error.⁵¹ Potential licensees, such as Moses, should not effectively be denied a license or suffer harmful interference in situations in which a licensee has failed to exercise due diligence in carrying out its obligations. Thus, here we will not require Moses to bear the brunt of DART's mistake.⁵² Under the circumstances presented, Moses was entitled to rely on the Commission's records reflecting that frequency 936.000 MHz was available for assignment. Moreover, the Commission was fully justified in relying on the frequency information DART listed on its renewal application and took reasonable action under the circumstances. DART's failure to identify its own error in the frequency information it submitted does not justify a departure from the Commission's long standing principles regarding the timely renewal of applications and the duty of a licensee to know the state of its license.

IV. CONCLUSION

13. After full consideration of the record, we find that the public interest does not mandate reinstatement of DART's authorization to operate on frequency 936.9000 MHz. Accordingly, we grant in part and deny in part the Petition to Deny, the Petition for Reconsideration and the Motion for Set Aside.⁵³ Specifically, we will allow DART to operate until expiration of its June 12, 2006 STA, but order DART to cease and desist from use of frequency 936.9000 MHz by August 11, 2006 when the STA terminates. Further, we deny the Request for Reinstatement and Cancellation.

V. ORDERING CLAUSES

14. 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 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Petition to Deny, the Petition for Reconsideration, and the Motion for Set Aside filed by Samuel Moses on November 6, 2002, November 27, 2002, and November 27, 2002, respectively, ARE GRANTED IN PART AND DENIED IN PART to the extent set forth herein.

15. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Opposition to Petition to Deny or Informal Objection and Request for Reinstatement of Licensed Frequency and for Cancellation or Revocation of License, filed by the Dallas Area Rapid Transit Authority on November 18, 2002 IS DENIED.

16. IT IS FURTHER ORDERED that DART shall terminate its operations on frequency 936.9000 MHz on or before August 11, 2006.

17. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Motion for Stay filed by Samuel Moses on November 27, 2002 IS DISMISSED as moot.

⁵¹ See Request for Reinstatement and Cancellation at 5.

⁵² See *VSS*, 15 FCC Rcd at 6227 ¶ 7 ("we note that VSS . . . had multiple opportunities to seek correction of its license").

⁵³ Because our action addresses DART's renewal grant on the merits, we need not consider Moses's argument that the Commission erred in granting DART's November 7, 2002 STA to operate on frequency 936.9000 MHz while this controversy remained unresolved. We therefore dismiss the Motion for Stay filed by Moses on November 27, 2002 as moot.

18. 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

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau