

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

In the Matter of )
EARTH INCORPORATED ) FCC File No. 0002172365
Assignor )
ESP WIRELESS TECHNOLOGY GROUP, INC. )
Assignee )
Application for Consent to the Assignment of the )
License for Private Land Mobile Radio Station )
WPRS297, Chicago, Illinois )
FERRARI EQUIPMENT COMPANY )
Petition for Revocation of License of Earth )
Incorporated for Station WPRS297, Chicago, )
Illinois )
FERRARI EQUIPMENT COMPANY )
Informal Request to Delete Call Sign WPRS297 )

ORDER

Adopted: August 10, 2006

Released: August 11, 2006

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

1. Introduction. We have before us a Petition to Dismiss or Deny<sup>1</sup> filed by Ferrari Equipment Company (Ferrari) against the above-captioned application to assign the license for private land mobile radio station WPRS297, Chicago, Illinois, from Earth Incorporated (Earth) to ESP Wireless Technology Group (ESP Wireless, and together with Earth, the Applicants).<sup>2</sup> We also have before us two earlier-filed pleadings from Ferrari pertaining to the WPRS297 license: an Informal Request to delete call sign WPRS297 from the Commission's Universal Licensing System database,<sup>3</sup> and a Petition for Revocation of the license for station WPRS297.<sup>4</sup> The three Ferrari pleadings all are based on an allegation that the license for station WPRS297 has cancelled automatically pursuant to Section 90.157 of the Commission's Rules<sup>5</sup> due to permanent discontinuance of station operation.<sup>6</sup> The Applicants have filed responsive

<sup>1</sup> Ferrari Equipment Company, Petition to Dismiss or Deny (filed June 3, 2005) (Petition).

<sup>2</sup> FCC File No. 0002172365 (filed May 24, 2005).

<sup>3</sup> Ferrari Equipment Company, Informal Request (filed April 27, 2004) (Informal Request).

<sup>4</sup> Ferrari Equipment Company, Petition for Revocation of License (filed August 24, 2004) (Petition to Revoke).

<sup>5</sup> 47 C.F.R. § 90.157. Section 90.157 provides that a license shall cancel automatically upon permanent discontinuance of operations, and that "any station which has not operated for one year or more is considered to have been permanently discontinued."

pleadings denying the allegation of permanent discontinuance.<sup>7</sup> For the reasons discussed below, we deny the Petition, the Informal Request, and the Petition to Revoke.

2. *Background.* On January 10, 2001, the Commission licensed Earth to operate station WPRS297. Earth permitted Nextel to manage these frequencies assigned to station WPRS297 in Nextel's system.<sup>8</sup> Prior to termination of Nextel's operation of its system in February 2003,<sup>9</sup> on December 28, 2002, Earth entered into an agreement to share the central controller of a different 900 MHz facility.<sup>10</sup> This agreement remained in effect until July of 2003. On November 26, 2003, Earth filed a modification application to relocate the station to the Sears Tower.<sup>11</sup> On April 13, 2004, the application was granted.

3. In support of its claim that the subject license cancelled automatically due to permanent discontinuance of station operation, Ferrari asserts that Earth had used the authorized frequencies as part of a group of 900 MHz trunked channels operated as part of Nextel's system, but that this system was

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<sup>6</sup> See, e.g., Petition at 2; Informal Request at 2; Petition to Revoke at 2. Given that all three Ferrari pleadings essentially make the same argument based on the same factual allegations, we will cite hereinafter only to the Petition (and the pleadings responsive to the Petition), except when circumstances require otherwise.

<sup>7</sup> The Applicants filed a joint Opposition to the Petition. Earth Incorporated and ESP Wireless Technology Group, Inc., Opposition to Petition to Dismiss or Deny (filed July 26, 2005) (Opposition). Ferrari filed a Reply to the Opposition. Ferrari Equipment Company, Reply to Opposition to Petition to Dismiss or Deny (filed August 2, 2005) (Reply). In addition, Earth filed an undated Answer to the Petition to Revoke. In addition, we note that the Public Safety and Critical Infrastructure Division (Division), Wireless Telecommunications Bureau, sent a letter of inquiry to Earth pursuant to Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 308(b), requesting information responsive to the allegations in the Informal Request. Letter dated September 13, 2004, from Tracy Simmons, Associate Division Chief, Public Safety and Critical Infrastructure Division, to Tom Kanzler, Earth Incorporated (Division Letter). The record in this proceeding includes Earth's response to the Division Letter. Letter dated October 11, 2004, from David M. Laz, Counsel for Earth Inc., to Tracy Simmons, Associate Division Chief, Public Safety and Critical Infrastructure Division (Earth Response to Division Letter). Finally, on January 12, 2006, the Applicants filed a Supplement to the Opposition (Supplement), along with a Request for Acceptance of Supplement, to provide a certification, under penalty of perjury, from Mr. Joseph L. Polito, to further substantiate its assertion that it did not discontinue operation of station WPRS297. Although the Applicants contend that this unauthorized pleading is responsive to "certain additional statements" in the Reply, see Request for Acceptance of Supplement at 2, the Applicants do not offer any persuasive reason as to why this information could not have been provided earlier, with the Opposition. In any event, we find that the additional information provided in the Supplement is not relevant, given our conclusion, as discussed in the text, *infra*, that evidentiary deficiencies in the Petition and other Ferrari pleadings are dispositive of this matter. Accordingly, we deny the Request for Acceptance of Supplement, and dismiss the Supplement as an unauthorized pleading. See, e.g., 47 C.F.R. § 1.45; Kim Shaw Wong, *Memorandum Opinion and Order*, 11 FCC Rcd 11928, 11930 ¶ 7 (1996). We therefore dismiss as moot both the Motion for Leave to File Reply to Supplement and the Reply to Supplement filed by Ferrari on February 14, 2006.

<sup>8</sup> Petition at 3; Opposition at 3.

<sup>9</sup> Petition at 3-4. Attached to the Petition are documents to substantiate the claim that Nextel's system was scheduled for termination in December 2002, *id.* at Attachment 1 (the Petition to Revoke), Exhibits A-F. One of the exhibits, consisting of a letter from Alan Baker of Illinois Communications, indicates that the system actually was returned to operation for approximately forty-five days in early 2003, and so did not shut down completely until February 2003. *Id.* at Attachment, Exhibit F.

<sup>10</sup> *Id.* at 4. The Applicants submit accounts payable records and other documentation to substantiate the December 28, 2002 and the July 2003 transactions. *Id.* at Exhibits 1-6. According to the Applicants, Earth continued to pay site rent at the initial site through August 31, 2003. *Id.* at 4, Exhibit 4.

<sup>11</sup> FCC File No. 0001529074.

terminated by December 31, 2002.<sup>12</sup> Ferrari observes that Earth did not file a modification application to relocate the station until November 26, 2003, and that the modification application was not granted until April 13, 2004, more than fifteen months after Nextel shut down its system.<sup>13</sup> According to Ferrari, these circumstances establish that station WPRS297 was not operated for a period of more than one year after termination of Nextel's system, and that, as a consequence, the license for station WPRS297 canceled automatically, and therefore may not be assigned by Earth to any other party.<sup>14</sup>

4. *Discussion.* We conclude that Ferrari has not substantiated its allegation that the license for station WPRS297 has cancelled automatically due to permanent discontinuance of station operation. As noted, the Petition and the other filings by Ferrari pertaining to the station are premised on a supposition that the station must have discontinued operation because more than one year elapsed between the shut-down of the system in February 2003, and the Commission's April 2004 approval of the Modification Application authorizing relocation of the station to the Sears Tower. The Applicants contend, however, that they continued to operate through alternative arrangements until July or August 2003, and then commenced operation at the Sears Tower in September 2003.<sup>15</sup> To refute this claim, Ferrari relies primarily on the allegation that certain equipment that had been used by Earth at the original site was removed to a Ferrari warehouse in January 2003.<sup>16</sup> Even if true, however, this circumstance does not demonstrate that the station did not continue operating using other equipment.

5. In any event, it is well established that "claims of a station's non-operation or permanent discontinuance should be substantiated by detailed radio frequency (RF) monitoring studies."<sup>17</sup> Sporadic or occasional monitoring is insufficient; Commission precedent is clear that, at a minimum, proof of detailed monitoring studies must be presented to substantiate allegations of permanent discontinuance of operations.<sup>18</sup> In the instant case, Ferrari does not offer any monitoring evidence at all. Without such

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<sup>12</sup> Petition at 3-4.

<sup>13</sup> *Id.* at 4, *citing* FCC File No. 0001529074 (filed November 26, 2003). In its Petition to Revoke, Ferrari also asserts that the modification application was granted in error due to Earth's failure to disclose the discontinuance of operation, and that this omission reflects a lack of candor on the part of Earth. Petition to Revoke at 4-5. In addition, Ferrari says that the Informal Request, although titled as such, "alternatively could be considered a Petition for Reconsideration [of the approval of the Modification Application] since the pleading was filed shortly after the pending relocation application, referenced therein, was granted." Petition to Revoke at 4. As discussed *infra*, the pleading in question would fail as a petition for reconsideration for the same reason it fails as an Informal Request, namely, its failure to provide a *prima facie* showing of discontinuance of operation.

<sup>14</sup> Petition at 4.

<sup>15</sup> Earth has represented that "ESP Wireless activated WPRS297 at 233 South Wacker, Chicago, Illinois [the Sears Tower] on or about September 1, 2003, where it continues to operate presently." Earth Response to Division Letter at 1. However, Earth does not explain under what authority it relocated station WPRS297 on or about September 1, 2003. Earth did not file the requisite modification application until November of that year, and the modification application was not granted until April 2004. We will refer this matter to the Enforcement Bureau. In addition, although ambiguous, the representation that it was ESP Wireless, rather than Earth, that "activated" the station at the Sears Tower suggests the possibility of an unauthorized assignment of the license. We recognize, however, that this language may also be intended to describe a permissible arrangement between Earth and ESP Wireless. Given that we are referring the matter of the possible unauthorized relocation of the station to the Enforcement Bureau, we also refer to the Enforcement Bureau the matter of the possible unauthorized assignment of the underlying license.

<sup>16</sup> Reply at 2.

<sup>17</sup> See Cumulus Communications Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 15631, 15633 ¶ 9 (WTB PSCID 2004).

<sup>18</sup> See, e.g., Cellular Design Corporation, *Memorandum Opinion and Order*, 14 FCC Rcd 13059, 13064 ¶ 12 (1999) (holding that evidence of sporadic monitoring was insufficient by itself to conclusively establish discontinuance of station operation); Quatron Communications, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 4749, 4753 ¶ 13

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evidence, Ferrari can not substantiate its claim that station WPRS297 remained off the air for at least one year.

6. *Conclusion and Ordering Clauses.* Ferrari has not demonstrated that the license for station WPRS297 cancelled automatically due to discontinuance of station operation, pursuant to Section 90.157 of the Commission's Rules. Accordingly, we deny Ferrari's Informal Request to delete call sign WPRS297 from the ULS database, Ferrari's Petition to Revoke the license for station WPRS297, and Ferrari's Petition to Deny the captioned application to assign the license for station WPRS297 from Earth to ESP Wireless.

7. 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 filed by Ferrari Equipment Company on June 3, 2005, IS DENIED.

8. 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 Informal Request filed by Ferrari Equipment Company on April 27, 2004, IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 312 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 312, and Section 1.91 of the Commission's Rules, 47 C.F.R. § 1.91, the Petition for Revocation of License filed by Ferrari Equipment Company on August 24, 2004, IS DENIED.

10. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the Request for Acceptance of Supplement to Opposition to to [sic] Petition to Dismiss or Deny filed by Earth Incorporated and ESP Wireless Technology Group, Inc. on January 12, 2006 IS DENIED, and the Supplement to Opposition to Petition to Dismiss or Deny filed by Earth Incorporated and ESP Wireless Technology Group, Inc. on January 12, 2006 IS DISMISSED.

11. 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 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the Motion for Leave to File Reply to Supplement to Opposition to Petition to Dismiss or Deny filed by Ferrari Equipment Company on February 14, 2006, and the Reply to Supplement to Opposition to Petition to Dismiss or Deny filed by Ferrari Equipment Company on February 14, 2006 ARE DISMISSED.

12. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 310(d), the Application to Assign License WPRS297 from Earth Incorporated to ESP Wireless Technology Group, Inc. filed on May 24,

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(2000) (same); Mayer Reprographics, Inc., *Order on Reconsideration*, 18 FCC Rcd 11328, 11330 ¶ 7 (WTB PSPWD 2003) (evidence that licensee terminated its service agreement to use a community repeater station, even when coupled with allegation that licensee's station was monitored for more than one year, was deemed insufficient to demonstrate discontinuance of operation in the absence of monitoring studies); Bay Ventures, *Order*, 17 FCC Rcd 8766, 8771 (WTB CWD 2002) (holding that individual site-log entries and isolated visits do not provide sufficient evidence to demonstrate that a station did not operate for a period of one year or more); *cf.* Elmont Trans Med Corporation, *Order*, 18 FCC Rcd 18692, 18694-95 ¶ 9 (WTB PSPWD 2003) (finding that discontinuance of operation was established by a detailed, sworn declaration of continuous monitoring of the station over a specified period of more than one year, in rebuttal to which the licensee offered only an unsworn general statement that the station was in operation).

2005, FCC File No. 0002172365, SHALL BE PROCESSED consistent with this *Order* and the Commission's Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that we SHALL REFER this matter to the Enforcement Bureau in accordance with this *Order*.

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 COMMISSION

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