

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 ON RECONSIDERATION

Adopted: March 23, 2009

Released: March 24, 2009

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we address the Petition for Reconsideration filed by Ferrari Equipment Company (Ferrari) on September 11, 2006. Ferrari seeks reconsideration of an August 11, 2006 Order by the Wireless Telecommunications Bureau's former Public Safety and Critical Infrastructure Division (PSCID). The Order denied three petitions filed by Ferrari, all of which were based on an allegation that the license for Station WPRS297, Chicago, Illinois, had canceled automatically pursuant to Section 90.157 of the Commission's Rules due to permanent discontinuance of

1 Petition for Reconsideration (filed Sept. 11, 2006) (PFR).

2 Earth Incorporated, Order, 21 FCC Rcd 9122 (WTB PSCID 2006) (Order).

3 Pursuant to a Commission reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, Order, 21 FCC Rcd 10867 (2006).

4 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."

station operations.⁵ Earth Incorporated (Earth, Inc.) and ESP Wireless Technology Group (ESP Wireless, and together with Earth, Inc., the Applicants) oppose the Petition for Reconsideration.⁶ For the reasons discussed below, we deny the Petition for Reconsideration.

II. BACKGROUND

2. On January 10, 2001, the Commission licensed Earth, Inc. to operate Station WPRS297, consisting of a base station and seventy-five mobile units utilizing frequency pairs 900/939.1625 MHz and 900/939.1875 MHz.⁷ Earth, Inc. permitted Nextel to manage these frequencies in Nextel's system.⁸ Nextel terminated operation of the system on December 31, 2002.⁹ On April 23, 2004, the application of Earth, Inc. to modify the license for Station WPRS297 by moving the base station was granted.¹⁰ Later in 2004, Ferrari filed two of its petitions alleging that the license had canceled due to permanent discontinuance of operations.¹¹ On May 24, 2005, Earth, Inc. filed the above-captioned application to assign the license to ESP Wireless,¹² in response to which Ferrari its third petition.¹³ After the *Order* denied Ferrari's petitions, PSCID consented to the assignment.¹⁴

3. The dispute in this matter relates to the period between the Nextel system shutdown in December 2002 and the grant of the modification application in April 2004. PSCID found that Earth, Inc. entered into an agreement to share the central controller of a different 900 MHz facility prior to the shutdown.¹⁵ PSCID acknowledged Ferrari's contention that the base station equipment formerly used by Earth, Inc. was removed in January 2003,¹⁶ but concluded that this did not refute Earth, Inc.'s explanation that it operated using a different controller until August 2003.¹⁷ The *Order* noted that the Applicants had submitted accounts payable records and other documentation to substantiate that arrangement, and that

⁵ Specifically, Ferrari filed an informal request to delete the call sign from the Commission's licensing database on April 27, 2004, *see* Informal Request (filed Apr. 27, 2004), a petition to revoke the license on August 24, 2004, *see* Petition for Revocation of License (filed Aug. 24, 2004), and a petition to dismiss or deny the above-captioned application to assign the license on June 3, 2005, *see* Petition to Dismiss or Deny (filed June 3, 2005) (Petition to Dismiss). Earth Incorporated (Earth, Inc.) and ESP Wireless Technology Group opposed the Petition to Dismiss. *See* Opposition to Petition to Dismiss or Deny (filed July 26, 2005) (Opposition to Petition to Dismiss). Ferrari filed a reply. *See* Reply to Opposition to Petition to Dismiss or Deny (filed Aug. 2, 2005) (Reply to Opposition to Petition to Dismiss).

⁶ *See* Opposition to Petition for Reconsideration (filed Sept. 21, 2006) (Opposition to PFR). Ferrari filed a reply. *See* Reply to Opposition to Petition to Reconsideration (filed Oct. 2, 2006) (Reply).

⁷ *See* File No. A061953 (filed Oct. 27, 2000).

⁸ Petition to Dismiss at 3; Opposition to Petition to Dismiss at 3.

⁹ The *Order* indicated that Nextel operated the system until February 2003, *see Order*, 21 FCC Rcd at 9123 n.9, but Ferrari points out that the letter on which the *Order* relied for that conclusion pertained to a different system. *See* PFR at 3.

¹⁰ *See* FCC File No. 0001529074 (filed Nov. 26, 2003).

¹¹ *See supra* note 5.

¹² *See* FCC File No. 0002172365 (filed May 24, 2005).

¹³ *See supra* note 5.

¹⁴ ESP Wireless subsequently assigned frequency pair 900/939.1625 MHz to FCI 900, Inc. *See* FCC File No. 0002829313 (filed Nov. 27, 2006).

¹⁵ *See Order*, 21 FCC Rcd at 9123 ¶ 2 (citing Opposition to Petition to Dismiss at 4).

¹⁶ *Id.* at 9123 ¶ 4 (citing Reply to Opposition to Petition to Dismiss at 2)

¹⁷ *Id.*

Earth, Inc. continued to pay rent for the original site through August 2003.¹⁸

III. DISCUSSION

4. As discussed above, PSCID concluded that Ferrari did not substantiate its allegations that the license for Station WPRS297 cancelled automatically due to permanent discontinuance of station operation. On reconsideration, Ferrari argues that the evidence submitted by the Applicants did not demonstrate that Earth, Inc. continued to operate through a base station, which is required for a station to be deemed placed in operation.¹⁹ Specifically, Ferrari notes that the transactions from February to July 2003 appear to relate only to air time.²⁰ We agree with PSCID, however, that this is not inconsistent with Earth, Inc. having operated the channels on another system between the Nextel shutdown and the relocation of its base station. PSCID's conclusion is supported by a January 2003 service bill for adding two channels to an existing system²¹ and correspondence from the owner of the other system acknowledging that the channels would be removed in August 2003.²²

5. PSCID also appeared to indicate that Ferrari's showing was insufficient because it was not supported by detailed monitoring studies.²³ We agree with Ferrari that permanent discontinuance of station operations can be substantiated without monitoring.²⁴ Indeed, we note that the Commission has found that monitoring studies are not always necessary.²⁵ Nonetheless, we reiterate that Ferrari's showing was insufficient, because, as discussed above, the circumstantial evidence of discontinuance of operations was not persuasive.

6. In its Petition for Reconsideration, Ferrari for the first time offers a declaration asserting that it did, in fact, monitor the frequencies continuously between December 31, 2002 and February 2004. We agree with the Applicants²⁶ that the submission is untimely under Section 1.106(c) of the Commission's Rules, which permits a petition for reconsideration that relies on facts not previously presented only when the facts relate to events which have occurred or circumstances have changed since

¹⁸ *Id.* at 9122 n.10 (citing Opposition to Petition to Dismiss at Exhibits 1-6).

¹⁹ See PFR at 5-8 (citing National Science & Technology Network, Inc., *Order*, 15 FCC Rcd 16491, 16492 ¶ 3 (WTB PSPWD 2000) (citing Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing and Operation of Private Land Mobile Radio Stations, *Report and Order*, 6 FCC Rcd 7297, 7299 ¶ 10 (1991))).

²⁰ See *id.* at 6 (citing Opposition to Petition to Dismiss at Exhibits 1, 2).

²¹ See Opposition to Petition to Dismiss at Exhibit 1.

²² See *id.* at Exhibit 5.

²³ See *Order*, 21 FCC Rcd at 9124-25 ¶ 5.

²⁴ See PFR at 3-4.

²⁵ As the Commission stated,

Certainly, there are circumstances where monitoring studies are unnecessary, such as an undisputed statement from the site owner/manager that the putative licensee no longer maintains a transmitter at the authorized site, or persuasive evidence that the licensee no longer exists, or an admission by the licensee that the facility ceased operating. Absent such evidence, however, a claim of permanent discontinuance that relies materially on the complainant's contention that the licensee has not been heard on the authorized frequencies must, under Commission precedent, be supported by continuous monitoring.

National Ready Mixed Concrete Co., *Memorandum Opinion and Order*, 23 FCC Rcd 5250, 5254-55 ¶ 11 (2008) (footnotes omitted).

²⁶ See Opposition to PFR at 2.

the last opportunity to present such matters; the facts were unknown to the petitioner until after his last opportunity to present such matters and could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or the public interest requires consideration of the facts.²⁷ Ferrari filed three petitions in this matter after the time it states that the monitoring was completed, and it does not explain why this information was not presented earlier.²⁸

IV. CONCLUSION AND ORDERING CLAUSES

7. Ferrari bears the burden to demonstrate a *prima facie* case that Station WPRS297 was non-operational for at least a year. The *Order* correctly determined that Ferrari failed to substantiate its claims with the evidence it presented. Accordingly, for the reasons stated herein, Ferrari's Petition for Reconsideration is denied.

8. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by Ferrari Equipment Company on September 11, 2006 IS DENIED.

9. 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 COMMUNICATION COMMISSION

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

²⁷ 47 C.F.R. § 1.106(c).

²⁸ Instead, Ferrari argues that the public interest requires consideration of the monitoring information "in order to maintain the viability of the Commission's Rules and require accountability of the Commission's licensees." See PFR at 5; *see also* Reply at 3. We are not persuaded by the authority cited by Ferrari. Those and other decisions suggest that consideration of new information will more likely be deemed to be in the public interest to permit a licensee to demonstrate why it should be permitted to retain its license, rather than to permit another party an additional opportunity to argue that the license should be terminated. *See, e.g.*, Billy J. Rutledge, *Memorandum Opinion and Order*, 14 FCC Rcd 6565, 6568-69 ¶ 7 (1999); *see also, e.g.*, Colorado Materials Holding Corp., *Order on Reconsideration*, 22 FCC Rcd 13997, 13998 n.10 (WTB MD 2007) (citing Linda Crook, *Memorandum Opinion and Order*, 3 FCC Rcd 1867, 1868 ¶ 6 (Rev. Bd. 1988)).